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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1929

No. 301

RAILROAD COMMISSION OF WISCONSIN, LEWIS E. GETTLE, ADOLPH KANNEBERG, ET AL., ETC., APPELLANTS,

vs.

W. G. MAXCY, AS RECEIVER OF THE WASHBURN WATER WORKS AND WASHBURN WATER WORKS COMPANY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WISCONSIN

FILED AUGUST 6, 1929

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[fols. a & 1] [Caption omitted]

[fol. 2]

IN UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN

ORDER GRANTING PERMISSION TO RECEIVER TO INSTITUTE SUIT IN EQUITY—Filed January 2, 1929

It appearing from the annexed and verified petition and the proposed complaint submitted to the Court herewith that it is necessary that the Receiver W. G. Maxcy join in the commencement of an action with the Washburn Water Works Company, as therein set forth,

Now, therefore, on motion of the solicitors for said Receiver,

It is hereby ordered that leave be and it is hereby given to said Receiver to commence said action in this Court.

Dated January 3, 1929.

By the Court:

(Signed) C. Z. Luse, Judge of the United States District Court Western District of Wisconsin.

[fol. 3] IN UNITED STATES DISTRICT COURT

APPLICATION OF RECEIVER FOR PERMISSION TO INSTITUTE SUIT IN EQUITY—Filed January 2, 1929

Come now the above named plaintiffs and respectfully show to the Court as follows:

That the plaintiffs have endeavored by a proceeding commenced before the Railroad Commission of Wisconsin to obtain an increase of rates, as appears from the verified complaint, proposed to be served in the above entitled action by the plaintiffs; that notwithstanding the showing made that daily confiscation was taking place and that the plaintiffs were not earning a sufficient return upon the investment and the property devoted to the public use, said Commission refused to provide adequate and sufficient rates and refused the plaintiffs to file rate schedule pro-

viding adequate and sufficient rates, whereby said confiscation is continued and has continued, and unless an action is commenced and the Railroad Commission of Wisconsin is enjoined from interfering with the plaintiffs in collecting rates which will provide an adequate return such confiscation will continue in the future; that the plaintiffs are without any other remedy and that it is necessary in order to protect their property to commence an action to enjoin said Commission from interfering with the collection of adequate rates and the enforcing of adequate rate schedules; that no action is now pending in any state court for the review of the order of the Railroad Commission referred to in the pleadings submitted herewith, and that unless an action is commenced the plaintiffs will be unable to collect additional rates, as appears fully from the allegations contained in the pleadings submitted herewith.

[fol. 4] That this application is made for the purpose of obtaining an order permitting the Receiver herein to commence an action in this Court to establish the right of the plaintiffs to increase rates and to enjoin said Railroad Commission of Wisconsin and the Attorney General of Wisconsin from interfering with the collection and the enforcement of adequate rates.

(Signed) W. G. Maxcy, Receiver, Washburn Water Works Company, by (Signed) H. L. Butler, (Signed) R. M. Rieser, Solicitors.

Duly sworn to by R. M. Rieser. Jurat omitted.

[fol. 5] IN UNITED STATES DISTRICT COURT

BILL OF COMPLAINT—Filed January 2, 1929

To the Honorable the District Judge of the District Court of the United States for the Western District of Wisconsin:

The plaintiffs herein bring this, their Bill of Complaint, against the above named defendants and respectfully allege and show to the court as follows:

I

The plaintiff W. G. Maxcy, as Receiver of the Washburn Water Works Company, is now and has been since the 19th day of May, 1925, the duly appointed, qualified and acting Receiver of said Washburn Water Works Company by virtue of an order of appointment issued out of this Court, and said Washburn Water Works Company is a duly organized and existing corporation engaged in the public utility business in the State of Wisconsin, and at all times hereinafter mentioned was and now is a public utility within the provisions of Sections 196.01 to 196.79 inclusive, Wisconsin Statutes 1927, which provide for the regulation of public utilities within this state. That by virtue of the ap-
[fol. 6] pointment of the said W. G. Maxcy as such Receiver and his qualifications for such appointment, said Receiver has been and is now managing and operating the property and business of said Washburn Water Works Company for the benefit of the creditors of said company and to preserve the assets and property of said company by order of this court.

II

That by an order made and entered by the Court in these proceedings, under which said Receiver was appointed, an order was duly entered authorizing the commencement of this action, and this action insofar as the Receiver of said Washburn Water Works Company is interested, is being prosecuted by virtue of the authority thus given.

III

The defendant Railroad Commission of Wisconsin (hereinafter sometimes referred to as Commission or Railroad Commission) is a Commission consisting of three members created by Sec. 196.01 and is by Sec. 196.02 of said Statute vested with power and jurisdiction to supervise and regulate the public utilities of the state and the rates and service thereof.

The defendants Lewis E. Gettle, Adolph Kannenberg and A. R. McDonald are the members of such Commission duly appointed, qualified and acting as such.

The defendant, John W. Reynolds, is the duly elected, qualified and acting Attorney General of the State of Wisconsin.

The City of Washburn is a municipal corporation organized and existing under and by virtue of the laws of the State of Wisconsin, and situated in the Western District of Wisconsin.

All of the individual defendants are residents and citi- [fol. 7] zens of Wisconsin, and of the Western District thereof, except the defendant Reynolds, who, as the plaintiffs are informed and believe, is a resident of the City of Green Bay, Brown County, Wisconsin, in the Eastern District of Wisconsin, but maintaining his official headquarters at the State Capitol in the Western District of Wisconsin.

IV

This action is one arising under the Constitution of the United States, as will more fully appear from the facts hereinafter stated.

The plaintiffs have been and are now being deprived of their property by the State of Wisconsin without due process of law, and are denied the equal protection of the law, contrary to the 14th Amendment to the Constitution of the United States.

The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand ($3,000.00) Dollars.

V

By Sec. 196.19 Wisconsin Statutes, every public utility operating within said state is required to file with said Commission schedules of its rates, tolls and charges.

By Sec. 196.22 it is declared unlawful for any public utility to depart from its filed rate schedule, and the rates specified in such schedules are declared to be the lawful rates until changed in accordance with the provisions of the public utility act.

By Sec. 196.20, all changes in rate after April 1, 1907, shall be ineffective unless filed with the Commission, as provided in such sections, except that by Sec. 196.77, procedure for the increase of rates is provided for on application to the Commission by means of a petition as therein provided.

[fol. 8] By Sec. 196.38 every public utility is prohibited from changing any rate which may have been fixed by the Commission, except upon the approval of the Commission.

By Sec. 196.66, it is provided that if any such public utility shall violate any provisions of the public utility act or shall do any act prohibited thereby, or shall fail or refuse to perform any duties enjoined upon it, for which a penalty has been provided, or shall fail, neglect or refuse to obey any lawful requirement or order made by such Commission, it shall for every such failure, violation, or refusal forfeit and pay to the treasury a sum not less than Twenty Five Dollars nor more than One Thousand Dollars for each separate thing; and further provides that, in construing and enforcing the provisions of such section, the acts, omissions or failure of any officer, agent or person acting for or employed by any such utility, when acting within the scope of his employment, shall in every case be deemed to be the acts, omissions or failure of such public utility; and Sec. 196.76 provides among other things that all penalties or forfeitures accruing under said acts shall be cumulative and induced for the recovery of one shall not be a bar for the recovery of any other penalty.

By Sec. 196.01 the various sections of the public utility act above referred to are applicable as well to the public utility corporation referred to in said act and throughout said law, as to the receiver or trustees appointed by any court, and therefore said laws, including the penalties, are applicable to the plaintiff receiver and to the plaintiff corporation.

Sec. 196.30 provides that any public utility may make complaint as to any matter affecting his own product or service, the same as any other person authorized by said act and Sec. 196.26 provides the procedure upon such complaint and for the prescribing by the Commission of new [fol. 9] rates, but there is no provision in the Statutes of Wisconsin in any manner providing for reimbursement to the utility for the losses it may suffer while its complaint is pending and undecided or for any losses it may have sustained by reason of the failure of such Commission to provide adequate rates or to authorize charges which would earn a fair return upon the value of the company's property.

By Sec. 196.73 it is made the duty of the Commission, with the aid and assistance of the Attorney General, to in stitute and prosecute all necessary actions or proceedings for the enforcement of all such statutes and laws and for the punishment of all violations thereof.

VI

Since prior to 1907, when the Wisconsin Public Utility Act was adopted, plaintiff has owned and operated a water works plant and distribution system for the supplying of water to and in the city of Washburn for both public and private use and consumption, the public use including the furnishing of water under pressure for fire extinguishing purposes.

VII

In December, 1910, an order establishing a new schedule of rates for the Washburn Water Works Company wherein the investment cost of the property of the Washburn Water Works Company before depreciation, was fixed at $69,-348.00, and less depreciation at $63,803.00. The schedule of rates then established remained in effect until October, 1921, when a new rate schedule was established.

VIII

In a new schedule of rates established in October, 1921, and as part of the decision in that case, the Commission said:

[fol. 10] "To the value noted above (that fixed in 1910) we have added the additions made to December 31, 1920, and obtained a cost new of $80,792.00, which has been used for a basis for our computations in this case."

In connection with this same rate proceeding and as part of its decision, the Commission reproduced the plant value from year to year, by adding to the value on a given year the additions during the preceding year, which shows that the investment or cost of the plant between the 1910 valuation referred to above, and 1916 was increased from $69,-518.00 in 1910, to $74,253.00 in 1916; and that of the $80,-792.00 valuation accepted in the 1921 decision, all but $74,-

253.00 of this valuation represented investment of cost prior to the high cost or war period.

IX

Following the decision of the Commission in 1921, proceedings were commenced for the purchase of the Washburn Water Works Company property, used and useful as a water utility, and numerous valuations were made by the staff of the Commission, including one for the average prices for the year ending June 30, 1923, which showed the cost of reproducing the physical property of said company to be on that basis $132,862.00, and on a ten-year average of prices for the ten-year period preceding the year 1923, the cost of reproduction was $106,838.00 and depreciated to reflect the then physical condition of the plant $91,599.00.

Following the submission of these figures the Commission entered an order fixing the value for purchase purposes of all units of property at $50,000.00, for the reasons stated in said decision, a copy of which is hereunto annexed, marked Exhibit "A" and made a part hereof.

Subsequent to the rendition of this decision, an appeal [fol. 11] was taken to the Circuit Court of Dane County, and that court on August 16, 1928, held the valuation of $50,000.00 to be illegal and void, the court saying that:

"The Commission practically found that the value of the utility, after depreciation, is $91,599.00, (in other words the Commission had adopted the ten-year average of prices) not including going value. Then it concludes because of unusual conditions in Washburn affecting business and the valuation of other property, the $50,000.00 is just compensation for the utility. This clearly shows an entire disregard of the finding that the utility is worth $91,599.00 after depreciation. The two cannot possibly be reconciled if the rules of law laid down in the above cited cases are to be given consideration."

Immediately following the rendition of this decision, judgment was entered and this judgment has not been appealed from.

X

On December 12, 1927, pursuant to the provisions of Sec. 196.20, Wisconsin Statutes, 1927, the Receiver, one of the

plaintiffs herein, filed with the Commission schedule of rates, providing an adequate return upon the property of the Washburn Water Works Company, actually devoted to the public utility service, a copy of which is hereto annexed, marked Exhibit "B" and made a part hereof. The Commission, however, in violation of its duties, under such section, refused to accept such scedule for filing, and refused to suspend the schedule of rates as contemplated and provided for by such section.

Following the filing of such proposed rate schedule, and because of the failure of the Commission to recognize such filing, the plaintiff Receiver filed an application for an increase of rates, sustaining the demand in such application upon the same facts as those contained in the rate schedule submitted for filing, and reserving all rights under such [fol. 12] original filing, and thereafter brought such proceeding to hearing before the Commission. In the meantime, however, and ever since the filing of such rate schedule with the Commission under Sec. 196.20 of the Statutes, plaintiff Receiver in making billings to customers has reserved the right to collect on the basis of the rate schedule so filed with the Commission, and has continually and always asserted that such rate schedule was actually in force and effect.

Following the taking of testimony in support of the application filed by the plaintiff Receiver; the Commission on the 4th day of December, 1928, made and filed its decision upon such application, a copy of which is hereunto annexed, marked Exhibit "C" and made a part hereof.

XI

In arriving at its decision on December 4, 1928, the Commission adopted as a value of the property of the utility the figure of $75,000.00, which sum was as hereinabove stated $12,116.00 less than the cost of reproducing the physical elements of such property, less depreciation on the Commission's inadequate and improper valuation as of January 1, 1928, as will be shown later, and but $3,500.00 more than the split inventory valuation fixed by the Commission and disregarded materials and supplies, required working capital estimated by the Commission in 1925 to be $3,000.00, and going value, all of which are necessary in arriving at a de-

cision of fair value of the Company's property, and all of which are elements of value and therefore property devoted to the public use upon which the Company is entitled to earn a fair return.

[fol. 13] Again in arriving at the cost of reproducing the property of the plaintiffs, the Commission resorted to wholly arbitrary, unjust and unfair methods of arriving at this item, by adopting the straight line method of depreciating the property of the company, rather than the four percent sinking fund method previously universally adopted by the Commission, having discarded the latter method immediately following the decision of the Wisconsin Supreme Court in the Waukesha Gas case, 191 Wisconsin, 565; the evident result and purpose of this change being to overcome and neutralize the effect of the rules laid down by that decision, by increasing the depreciation so as to reduce the value and to reflect the value below the true depreciated value of the property.

The effect of this change is demonstrated by the figures of the Commission's engineers submitted in 1922 and in 1928. In the former the average per cent of original condition of the depreciated property, then over thirty years old, was .857 per cent or .143 per cent less than new, and this condition per cent was approved by the Commission, but in the latter valuation by the same engineers a per cent of original condition was assigned to such property, after only five years had elapsed, of .76 per cent, and that in spite of the fact that in the interim new property had been added, which would offset the depreciation accruing during the five year period.

Although applying spot or present day prices in 1923, the Commission's engineers had arrived at a cost of reproducing the property of the plaintiffs of $132,862.00. The same engineers in making a re-valuation in 1928, after upwards of $3,000.00 of additional investment in the property of the plaintiffs had been made, found a cost of repro-
[fol. 14] duction of $114,089, a difference of more than $18,000.00, which should not and cannot be supported upon the evidence of record before the Commission, and which is far below the actual cost of reproducing the property, there being but very little variation in the prices of the material,

labor and equipment entering into the cost of reproducing a water works plant between 1923 and 1928.

Had the Commission taken into consideration all items and truly reflected the actual cost of reproducing property on the basis of present day prices, and given proper consideration to items of going value, working capital and materials and supplies, it would have and should have arrived at a value for the property devoted to the public use of not less than $130,000.00, as stated in the rate schedule filed in December, 1927, and as appears from the application for increase of rate filed with the Commission in January, 1928, and upon such basis, the Company would have been entitled to a substantial increase and to an increase equivalent to that set forth in the rate schedule filed and the application for increase of rates.

XII

With the rate base of $75,000.00, thus inadequately and improperly arrived at, the Commission thereupon proceeded to determine what in its judgment would be a fair rate of return, and what revenues would be required to take care of operating expenses and return.

In doing so it proceeded first to discount and reduce the actual operating expenses of the Company, by determining that it should install an additional electrical pump,—this [fol. 15] though at the hearings, the Commission, thru its expert representatives, admitted it had insufficient evidence to justify,—and should install more meters. The first of these propositions has already been demonstrated to be wrong and unsupported by the evidence; while the second proposition is impossible because the Receiver is without funds and the change is actually uneconomical, as shown by the undisputed evidence before the Commission.

By the arbitrary method thus employed, the Commission arrived at an estimated net saving in pumping costs of $1,650.00, and thereupon proceeded to cut down in its decision the actual pumping costs with the present electric pump from $6,558.83, as shown by the annual report of 1927, to its estimate of $4,908.00. It likewise decreased the distribution expense by over $1,000.00 and the commercial expenes by over $500.00, and the general

expense by $1,652.00; without any more evidence in the record to sustain such action and without justification or explanation. Its estimate thus improperly and arbitrarily arrived at was therefore $4,369.28 or over one-third less than the actual operating expenses, disclosed by the annual report of 1927, and actually expended for operating expenses in 1927, and this difference was accentuated by the failure, deliberate as appears from the decision, to include or make any allowance for legal expenses in what the Commission termed "incurred fighting this Commission's orders" and which, if included, would have added $1,000.00 to the annual expenses of this utility. Neither did the Commission make any allowance for Federal or State income taxes, nor for purification expense.

Actual operation during the year 1928 shows that the [fol. 16] pumping cost will be substantially as high as in 1927, and the remaining items will also be as large or larger, with the result that the estimated expenses contained in Exhibit "B" will be met if not exceeded.

XIII

The item for legal expenses, contrary to the recitals in the order of December 4, 1928, made by the Commission was not incurred entirely in contesting the orders of the Commission, but was also incurred in collecting hydrant rentals from the city (See 218 N. W. 825), and for other matters incident to the management of said company, and in every instance of contest of the Commission's orders and of legal expense incurred therefore, the utility was successful and the Commission held to be wrong.

Taking into consideration only the actual operating expenses as against the theoretical expenses, thus arbitrarily taken and assumed in the Commission's order, and adding thereto the item of $1,000.00 for proper legal expenses, chargeable against operations, exceeds by over $100.00 the total allowance fixed in the Commission's order for interest and return, in that it totals $5,369.28, and thereby although on the face of the Commission's order, it would appear that a return of $5,250.00, has been allowed to this Company, it has actually been denied all return and is short $100.00 of making operating expenses, when it meets its actual operating expenses in running the business as it

has done heretofore, and as is dictated by good management.

The apparent result thus outlined above must have been apparent to the Commission when it rendered its decision, for it made no provision therein for Federal income and [fol. 17] state income taxes, which would be a properly chargeable item of expense whenever net return is realized.

XIV

There has been no increase of rates for this utility since the order of October, 1921, but in an order determining the value of the property of this utility for purchase purposes, entered in April, 1924, the Commission said that:

"The last report of the Washburn Water Works Company, which has been filed with the Commission is for the year ending December 31, 1922. This report shows a total income available for interest, dividends and surplus amounting to $1,422.69, against which the interest requirements alone were $6,560.00, leaving a deficit of $5,137.31, for the year's operation. In October of that year the Commission entered an order, authorizing the Company to increase certain of its rates by amounts of from twenty per cent to twenty-five per cent. By that order the charge for fire protection is placed in the amount that the Company has reported for the year 1923. Twenty per cent would probably make it a total increase in rate other than for fire protection. This would amount to approximately $2,300.00, and if protected during 1923 would have increased the deficit to a little under $3,000.00. The total possible economy so far as we can determine would not be sufficient to entirely remove the deficit and in order to eliminate even the greater part of the deficit, a very substantial decrease in the cost of coal would have to be attempted."

Since that time there has been no marked decrease in operating expenses, and had the annual report of the company been filed on an accrual rather than a receipt and disbursement basis, the operating expenses of the company would be substantially the same for the entire period since 1922, as is evidenced by a summary of operating history attached to schedule of rates filed by the plaintiff Receiver

on the 12th day of December, 1927, with such Commission, being page two of Exhibit "B" herein. These operating expenses have already been cut by the Receiver to the very minimum, as it was necessary to do this in order to operate the plant at all, there being no other means or funds with which the Receiver could function and said funds being [fol. 18] in themselves insufficient to pay amounts now outstanding for part of the Receiver's salary, and for attorney's fees for the Receiver and for the Washburn Water Works Company.

In denying an application for increased rates by an order dated the 30th day of November, 1925, the Commission again stated:

"The amount available in 1924 for return and retirement expense, $1,258.48, is not of course sufficient to meet these requirements on the fair value of the property estimated at $53,000.00. On the other hand if the plant can be operated to realize economies such as we have estimated might be realized by the installation of meters and electrically driven pump, there would be available from operation a reasonable sum for return and retirement."

In two decisions therefore preceding the decision now *now* under consideration, the Commission expressly found that the Company was not making an adequate return and was receiving insufficient revenue to earn a fair return upon the fair value of the property, even considering that fair value to be less than actually represented the true value of the property.

In addition to the two determinations above referred to, the Commission had before it the evidence of operating expenses of this utility for a period of five years preceding January 1, 1928, (Exhibit "B" page 3) from which it appears that the average operating expenses were $15,302.49 during such period, and the actual expenses for the year 1927, including depreciation and taxes were $16,197.33, before taking into account an item of legal expenses incident to various kinds of litigation in which the company and the Receiver have been involved, from which item at least $2,000.00 is properly chargeable as such expense for the year 1927.

Taking therefore the five-year average of expenses, the total operating expenses, including depreciation [fol. 19] would properly be $17,197.33, as shown by the books of said company, and without providing adequate officers' salaries, which have not been paid or fully accrued, because of lack of funds of the company, but if the item of $1,000.00 were added to the actual operating expenses, including depreciation and taxes for 1927, this item would be $18,197.33. Such expenses will not be substantially less during the year 1928 and cannot be reduced if service to the public is to be maintained and the plant is to be operated with workmanlike and businesslike efficiency.

Upon the undisputed facts and the findings of the Commission, the record before the Commission showed that as against operating revenue before return of less than $12,000.00, found by the Commission to be necessary, the actual operating expenses of the Company, including depreciation and taxes exceed the sum of $18,000.00 per year.

XV

In order to arrive at the arbitrary and unreasonable estimate of operating expenses used by the Commission in arriving at its decision of December, 4, 1928, the Commission stated as reason for not accepting the actual expenses as above set forth, was, that in their judgment pumping expenses were too high.

To reduce this item they recommended the installation of an additional smaller electric pump, which would necessarily be required to operate longer hours, would improve the electric load factor and thereby reduce the rates that would be charged for the electric energy consumed. At the time of the hearing, however, the experts, representing the Commission, stated that they had insufficient proof to warrant such a conclusion, and nowhere in the records is [fol. 20] there any proof supporting the ultimate conclusions of the Commission and the recommendations of the Commission are absolutely refuted by the undisputed testimony in the record.

The arbitrariness of the Commission's finding on the basis of which the reduction in operating expenses was made, is illustrated by the language of the Commission (Exhibit "C" page 3), wherein the Commission says:

"It is not proposed to dispense with the large centrifugal pump for it is needed at times when the reservoir has an insufficient supply of water for fires. In order to secure the lower rate for power the large motor and pump must be idle and with *intelligent operation* and *fortunate distribution* of large fires or other necessity of operating the large pump a substantial saving may be made." (Italics ours.)

Almost the same justification for refusing rate increase was adopted by the Commission on November 30, 1925, and in previous decisions wherein the present electrically driven pump was recommended, it was estimated that a saving in operating expenses could be made. Upon such suggestions the Receiver did install an electrically driven pump, which the Commission now charges is too large, though useful at times of large fires. Actual experience with the Commission's estimates of operating expenses of an electrically driven pump, shows that its estimate of $3,000.00 saving in pumping costs, made in the decision of November 30, 1925, is substantially $3,500.00 less than actual cost, and yet in its decision of December 4, 1928, after its experts had been unwilling to express an opinion as to what saving might be made, the Commission again arbitrarily proceeded to estimate the savings and to refuse consideration of actual operating expenses of the plaintiffs.

XVI

As indicated by the findings of the Commission, this [fol. 21] Company has not earned a fair return upon the value of its property for many years, and for that reason it is and will continue to be difficult to interest capital in such venture, to offset this situation and induce capital to flow to this business it must be possible for such capital to earn a larger return and seven per cent is entirely inadequate for such purpose. The plaintiffs are informed and verily believe that no less than eight per cent will be necessary and for that reason again the Commission's order is confiscatory and illegal.

The order of the Commission not only shows that the Commission discounted a fair return to the plaintiffs, but that in assigning a valuation of $75,000.00, it discounted

what it regarded in previous findings as the real value of the property of the plaintiffs, devoted to public use and discounted such value below the actual investment of the plaintiffs in the property.

In addition to discounting such items, the Commission entirely omitted consideration of items of going value, working capital and supplies.

XVII

The property of the plaintiff has been and is economically operated, and the only criticism that the Commission has been able to make has been that the plaintiff should install more meters. Contrary to the claim of the Commission the plaintiffs have found upon investigation that by reason of the nature of the business and the additional operating expense incident to the reading of meters, repair of meters, change or installation of meters, as well as other similar expense and the carrying cost of such property, it is not economical to install more meters, the saving inci- [fol. 22] dent to the use of meters is less than the sum of such items of expense.

The Commission suggests in its order that the cost of production of water is higher in Washburn than in other cities of the State and that there has been a decrease in the population of the city during the recent past. The fact, however, is (and there was no evidence or finding to the contrary) that the plant was and is well designed and constructed, that certain hydrants of which complaint was made were installed under direction of the city officials; that there was no lack of reasonable or proper prudence in design or construction; that the decrease of population in the city has been only of the temporary population produced by the abnormal conditions existing in the city during the world war.

The arbitrary and confiscatory character of the order of the Commission is emphasized by the fact that the Supreme Court of the state had previously determined that in administering the public utility act the Commission could not justify confiscation by considerations of the value of the service to the community, the act furnishing to the public in case it regarded rates as exceeding the value of the service, the remedy of municipal acquisition, or, if the facts

justified the granting of a franchise for a competing utility. The Supreme Court of the State had also previously held that the Commission was not the manager of utility properties, and that it could not substitute its judgment as to what ought to be done in running the property for the judgment of the officers on this subject. Notwithstanding these directions to the Commission, the Commission proceeded to disregard the judgment of the managers of the property, refused to consider the actual operating history of the com-
[fol. 23] pany and substituted for these items the judgment of the Commission and new estimates, all of which were unsupported by evidence in the record.

XVIII

As shown by Exhibit "B" attached hereto in order for the plaintiff company to realize a fair return upon the property devoted to the public use and to pay the properly chargeable operating and incidental expenses there will be required an annual revenue of $33,254.80, as against the revenue provided by the Commission in its order of December 4, 1928, and that, as appeared in the hearings before the Commission and as set forth in this complaint, the plaintiffs herein were entitled to file and enforce the rates set forth in said Exhibit "B" and the Commission arbitrarily and improperly ignored this right in rendering its decision of December 4, 1928, by reason of which the plaintiffs herein will be deprived annually of not less than $15,-136.48.

This annual confiscation has continued for several years in the past and is largely responsible for the present plight of the plaintiff company and relief should and must be granted in the form of additional revenue, as set forth in this complaint.

XIX

If rates were temporarily made, as proposed herein on so low a valuation as $110,000.00, the tax burden will be increased by $1,802.50, figured on the present rates of taxes in the City of Washburn, and taking the operating ex-
[fol. 24] penses, at the average five-year of $15,302.49, as reported to the Commission, assigning of the existing un-

paid legal expenses $1,000.00 per year, over a five-year period executive officer's salary $1,200.00 per year and depreciation of one per cent on a physical valuation made by the Commission's engineers, a total of $20,404.99. In addition revenue would be required for providing for additional United States income taxes and Wisconsin income taxes, and return upon the inadequate valuation of $110,000.00. Taking but six per cent return on the $110,000.00, which is the very minimum necessary to pay interest charges on existing indebtedness of the company, pending the final trial of this case, the total revenue requirements on such inadequate valuation will be $27,957.99, as against revenues received under existing rates of $17,720.40, making necessary an increase in such revenues of $10,237.59.

XX

In order to provide this additional revenue, pending the final hearing of this cause, there has been prepared and there is attached hereto and made a part hereof a proposed schedule of temporary rates, marked Exhibit "D."

For the purpose of a preliminary and temporary injunction pending final hearing and without prejudice to the right to claim such fair value and return as set forth in Exhibit "B" hereto attached and as may be established by the evidence taken on such hearing, the rates provided in Exhibit "D" are such only as are required to yield the items above set forth, and to provide the difference of $10,237.59, above set forth, so as to take care of operating expenses, including taxes and depreciation and provide a return of but six per cent upon an inadequate value of [fol. 25] $110,000.00, adopted for the purpose of making the clearest possible showing supporting the issuance of a temporary injunction.

The proposed schedule Exhibit "D" accords with the rate system embraced in the schedule prescribed by the Commission, the only variation being difference in the charges for the respective types or kinds of service, and the municipal charge for fire protection has been increased to properly reflect the City's charge for the service made available, and bearing the usual ratio of charges for fire protection to total charges for other services rendered in a municipality.

XXI

The rates prescribed in the Commission's order of December 4, 1928, became effective for service rendered subsequent to the date of the order; the temporary rates proposed are to become effective as of the first day of January, 1929, and the bills rendered subsequent to such date shall be in accordance with the rate schedule proposed in Exhibit "D" attached hereto.

A new period for hydrant rentals commences on the first day of January, 1929, the City paying hydrant rentals semi-annually on the first days of January and July of each year. Proper and efficient administration of any new rate schedule can be most economically made if the new rate schedule becomes effective on January 1, 1929, and it is important and imperative therefore that the plaintiffs be immediately relieved from compliance with the unjust, confiscatory and illegal order of the Commission and that injunctional jurisdiction of this Court be immediately exercised.

Because of the facts hereinbefore set forth certain and irreparable injury and damage will be suffered by the plaintiffs, their service and credit will be seriously impaired [fol. 26] and probably destroyed, their property will be confiscated and their continued ability to render service to the public will be seriously and imminently threatened if plaintiffs are required, even for a brief period, to continue operation under the inadequate rates prescribed by the Commission in its order of December 4, 1928. An unusual emergency exists, and there is exceptional and imperative necessity for relief in order to prevent imminent disaster to the plaintiff. Unless immediate and adequate relief is given by this court the damage to the plaintiff will be irretrievable and irremediable.

The perilous condition of the plaintiffs is the result of no action, omission or default on their part, but is the direct result of the act of the State of Wisconsin and its agency is requiring plaintiff to operate for an indefinite future period under rates which are confiscatory. Should plaintiffs attempt to charge adequate and compensatory rates the defendants will, unless restrained and enjoined, invoke and enforce against the plaintiffs the provisions of the laws of Wisconsin which impose heavy penalties upon the charging of rates other than those prescribed or approved by the

Commission, and which, in such event, subjects plaintiffs and their agents to drastic penalties and to a multiplicity of actions and proceedings, civil and criminal. No adequate relief is available to the plaintiffs other than the injunctional relief herein sought.

Plaintiffs offer to do full equity in the premises and abide by such orders as the court may deem necessary and proper to impose as a condition of the granting of the injunctional relief herein prayed for.

XXII

In consideration whereof and for as much as plaintiffs [fol. 27] have no adequate remedy at law and can have relief only in a court of equity, plaintiffs pray that this court grant a temporary restraining order restraining and enjoining defendants, Railroad Commission of Wisconsin, Lewis E. Gettle, Adolph Kannenberg, and A. R. McDonald, as members thereof, and John W. Reynolds, as Attorney General of the State of Wisconsin, and their respective successors in office, (1) from enforcing or attempting to enforce against plaintiffs said order of the Commission of date December 4, 1928; (2) from interfering or attempting to interfere with plaintiff in charging, collecting and enforcing the rates set out in the schedule marked Exhibit "D" hereof; and (3) from instituting, or authorizing or directing the institution of, any suit, action or actions against plaintiffs, their agents or employees for the recovery or enforcement of any penalty under or by virtue of the statutes of Wisconsin by reason of the charging, collecting and enforcing by plaintiffs of the rates provided in Exhibit "D" hereof.

Plaintiffs further pray that upon the granting of a temporary restraining order the matter be made returnable at the earliest possible date.

Plaintiffs further pray that this honorable court issue a writ of subpoena in due form of law directed to each of the defendants commanding them and each of them at a certain day and under a certain penalty to be therein specified to appear before this honorable court and then and there to answer (but not under oath, an answer under oath being hereby expressly waived) all and singular the matters herein complained of and to abide by such orders and

decree as may be made in the premises, and that pending [fol. 28] the final hearing of this cause a temporary injunction be issued upon such notice and after such hearing as this court may deem proper and as by law provided restraining and enjoying the defendants and each of them and their successors in office in the manner as hereinbefore set forth in plaintiffs' prayer for a temporary restraining order; and that, upon final hearing of this cause, this court issue its permanent injunction restraining the defendants from interfering or attempting to interfere with plaintiffs in charging, collecting and enforcing in the City of Washburn the rates filed December 12, 1927, or such reasonable and adequate rates as shall be established upon the final hearing and trial of this cause and as shall yield to plaintiffs a reasonable return upon the fair present value of their property devoted to the public service.

Plaintiffs further pray that such other and further relief be granted as the needs of the case may require and as to the court may seem meet and proper.

Harry L. Butler, R. M. Rieser, Solicitors for Plaintiffs. Olin & Butler, of Madison, Wisconsin, of Counsel.

(Duly sworn to by W. G. Maxcy. Jurat omitted.)

[fol. 29] EXHIBIT A TO BILL OF COMPLAINT

(Title and recitals omitted)

Notice of the determination of the City of Washburn to acquire the property and plant of the Washburn Water Works Company actually used and useful in the service of the public was filed with the Commission June 28, 1922. The Washburn Water Works Company is a public utility engaged in furnishing water service in the City of Washburn to the city and its inhabitants. The Company never voluntarily accepted the indeterminate permit provided by the Public Utility Law and consequently in proceeding to acquire its property and plant the City was under the necessity of securing the verdict of a jury to the effect that necessity existed for the taking of such plant. The neces-

sary proofs as to the City's having followed the procedure requisite in cases of this kind and of the verdict of the jury have been submitted and constitute a part of the file in this case.

Hearings were held at Washburn on June 14, 1923, and October 4, 1923. At the first hearing appearances were entered as follows: McGovern, Hannan, Devos & Reiss by Mr. McGovern, and J. W. Bernard, City Attorney, for the City of Washburn; W. G. Maxcy, President, and D. M. Maxcy, Treasurer, for the Washburn Water Works Company.

At the second hearing the same appearances were entered.

The proofs offered in this case include appraisals made by the American Appraisal Company for the City of Washburn and by the Engineering Department of the Commission. There has also been submitted, informally, an appraisal of the property by Dabney H. Maury, a consulting engineer of Chicago. The Maury appraisal shows a value [fol. 30] before depreciation of $86,271.00, and after depreciation of $72,198. This purports to be based on an inventory as of January, 1921, to which prices as of June 1, 1922, were applied. This appraisal, however, has not been formally made a part of the record. No testimony has been introduced with reference to it and no cross examination had upon it. It is doubtful, therefore, whether it is entitled to any material weight in connection with the determination of the compensation to be paid by the City.

The appraisal submitted by the Engineering Department of the Commission was based upon the average prices for ten years prior to June 30, 1922, applied to an inventory as of November 1, 1922. In this appraisal the value before depreciation appears as $106,838.00 and after depreciation as $91,599.00. Neither of these figures includes any materials and supplies.

The valuation submitted by the American Appraisal Company is based upon the inventory taken by the Commission's Engineering Department to which the appraisal company has applied prices intended to reflect as nearly as possible the actual original cost in place of the existing property and plant. The result of this appraisal is to indicate a value of $69,964.83 before depreciation and $49,232.79

after depreciation. These figures include nothing for materials and supplies.

In addition to the sources of information mentioned above regarding the valuation of this property, the Commission has in its files an appraisal made by its Engineering Department as of November 15, 1909, showing a cost of reproduction before depreciation of $69,342.00 with a cost after depreciation of $63,803.00. In its several reports to the Commission covering the period from July 1, 1909, to December 31, 1922, the Company has reported a total of additions amounting to $12,762.00. The period covered by these reports commences four and one-half months prior to the date of the 1909 appraisal, and there may be some slight amount of duplication resulting from the addition of the reported capital additions to the November 15, 1909, appraisal, but the total of the additions reported for the [fol. 31] year ended June 30, 1910, was only $382.00, so that any duplication which may exist is negligible.

Before considering the testimony introduced relative to value, it may be well to call attention to a computation contained in the brief which has been submitted on behalf of the Company relative to original cost. In this brief the additions from the date of original construction of the property up to the 1909 appraisal are stated as $13,929.00. By deducting this amount from the undepreciated value determined by the Commission's engineers as of November 15, 1909, the Company arrives at an estimate of the original cost of the property and plant at the time of construction of $55,413.00. To this it adds, perhaps arbitrarily, $3,000.00 as working capital, thereby reaching an estimate of the original investment of $58,413.00. The brief further recites that the plant was financed by a $65,000.00 bond issue sold at ninety which should have provided an initial capital of $58,500.00, which checks very closely with the estimate obtained above.

The Company also has submitted a computation based upon the conclusion that the prices used in the ten-year average price basis employed by our Engineering Department in connection with the 1922 appraisal are about 30 per cent above the original cost of the entire property, including additions to construction from time to time. On this basis the original cost of the entire property would

be $62,183.00 and, by deducting what it states were the additions made subsequent to the construction of the original property, the Company reaches an estimate of $60,538.00 as the original cost of the system.

These conclusions, though not a matter of testimony, are the result of computations made upon the bases stated above and we think are entitled to some weight as indicating the probable actual cost of the original plant. No [fol. 32] records are in existence, or at least none can be discovered, which show what the actual cost was.

Coming now to the appraisal submitted by the Engineering Department of the Commission, we find the situation to be that there has been virtually no criticism submitted as to the inventory or as to the unit prices applied, although we do not mean by this to have it inferred that either party has agreed that the average prices for ten years prior to June 30, 1922, constitute a proper or acceptable basis for use in this case. So far as the record shows, the situation is simply that there seems to be no question as to the inventory having been correctly made nor as to the prices applied to that inventory being a fair average for the ten years prior to June 30, 1922. At certain points some criticism was indicated but no testimony was introduced in support of such criticism, and we think we may fairly conclude, therefore, that $106,838.00 correctly represents the cost of reproduction of the property in existence November 1, 1922, on the basis of the ten-year average referred to. When we come to the effect to be given to depreciation, however, the situation is quite different. A very considerable portion of the record in this case consists of criticism by the City of the amount of accrued depreciation indicated by our engineers' appraisal and of data supporting the City's conclusions.

In all utility valuations the matter of the determination of the true condition of any or all units of property is a difficult one and this is probably more true of a water works than of any other class of utility. This is for the reason that the greater portion of the property of water works companies, at least of those with which we are familiar, consists of cast-iron distribution mains whose life is un- [fol. 33] known. There is no water works property in Wisconsin, and probably there are very few in the entire coun-

try, which has been in existence long enough for any accurate conclusion to be reached as to how long cast-iron mains will last. It is known that in some cases such mains have been in good condition after a life of several hundred years, but these are isolated cases from which it would be unsafe to draw any general conclusion. It has been quite a common practice with appraisal engineers to assign a life of one hundred years to cast-iron mains, but how nearly this represents the actual life which may be expected no one can determine.

In making its appraisal our Engineering Department determined the amount of accrued depreciation upon a sinking fund basis. The sinking fund basis as a method of providing for retirement losses is a definite, well-understood basis. It is not so clear, however, that the physical deterioration or the effect of other elements tending to the ultimate retirement of the property follows such a curve as results from a given method of providing against the loss. Many engineers take the position that depreciation is less rapid during the first years of the life of the property than during later years, and certainly so far as the effect of wear and tear may be determined by inspection this conclusion appears to be valid. In opposition to this view, however, it is contended that, if a given unit of property has a definitely determinable life, the value of that unit of property is diminished in direct proportion to elapsed life. The application of this theory to the appraisal made by our Engineering Department would of course result in materially reducing the cost less depreciation as shown in that appraisal.

In the report submitted by the American Appraisal Company the effect to be given to accrued depreciation has been computed substantially upon a straight-line basis [fol. 34] although as we understand, without rigid adherence at every point to the necessarily arbitrary estimate of life on much of the property.

It is impossible to determine to what extent deterioration of the several items of property composing the plant of the Washburn Water Works Company has actually taken place. That depreciation may, in fact, be much more than the amount indicated by our engineers' appraisal. It is not inconceivable, however, that some portions of the system, particularly the large portion represented by cast-

iron mains, may have a life many times as great as the arbitrary life usually assigned thereto, and that the actual depreciation may be less than that shown in our engineers' appraisal.

What weight should be given to the report submitted by the American Appraisal Company is difficult to determine. In very few particulars does the cross-examination of the witness who presented this report afford grounds for any conclusion that the report is substantially in error. Nevertheless the amount of the appraisal before depreciation is so much less than our 1909 appraisal plus additions to the end of 1922 which was made on the basis of what have usually been considered normal prices, that reconciliation of the two is very difficult. The Company's computations to which we have heretofore referred as to original cost of the property are persuasive, althought not necessarily convincing. It is quite probable, of course, that our 1909 appraisal plus reported additions is more than the actual investment cost of the items making upon the property and plant, but we are inclined to give to that appraisal a very material weight as indicating the probable investment cost.

So far as the matters to be considered have to do with the value of physical property, undepreciated, on various [fol. 35] price bases, the problem before us presents no unusual difficulty unless it be in reconciling the report of the American Appraisal Company with the 1909 appraisal of our Engineering Department.

So far as the effect to be given to accrued depreciation is concerned, we do not know the actual accrued depreciation and we know of no way of determining it. We are inclined to hold, in view of all the uncertainties in the situation, that the report of our Engineering Department is not substantially in error as to the degree to which the physical property has depreciated.

If there were no unusual conditions existing at Washburn, the determination of the just compensation in this case could be based upon the evidence submitted as to physical value and a satisfactory conclusion drawn therefrom, but conditions at Washburn are most decidedly different from those existing in any case where the Commission has had to pass upon just compensation. During the war and for a short time thereafter, Washburn experi-

enced a decided boom because of the work of the DuPont Powder Factory at Barksdale. About 100 houses were constructed to house workmen of this concern, all of which have been removed. The testimony of the chief of police is that in August, 1923, he made a complete canvass of the city to determine the number of vacant premises. He testified that there were 131 vacant places, not including shanties, sheds, etc., which were not habitable. In this number each unit of space occupied for a distinct purpose, such as a flat or store, was counted as one-half of a building. The population of the city as shown by the 1920 census was 3,707. Whether this population would be found by a census taken now is very questionable.

Something of the experience of the city during the past several years is indicated by the assessed valuation of [fol. 36] property. In 1918 the real estate assessment was $1,615,012. This assessment reached its peak in 1920 with $1,850,185, and each year since then it has declined, to a figure of $1,385,952 in 1923. The personal property assessment has had an even more marked decline from a maximum of $1,106,480 in 1918 to $448,015 in 1923. The 1923 assessment of personal property was lower than that of any pre-war year since 1910.

The testimony of the former mayor of Washburn is to the effect that in 1910 there were three lumber mills in the town employing during the busy season some three or four hundred men; that now there is no lumber mill in operation, but a box factory employing a small number of men and a number of girls and boys. He testified also that in his opinion the value of property in the City of Washburn had declined to a very much greater extent than indicated by the assessment roll, that the full maximum tax rate allowed by law on the basis of existing assessment was required to produce sufficient income to meet the City's requirements, if it could be collected, and for that reason a great majority of the taxpayers had accepted the basis of assessment as being fair among the taxpayers and not because it represented true value. He testified further that in his opinion not five per cent of the property in Washburn could be sold for cash on the basis of its assessed value. The testimony of this witness also indicates that it is hardly possible to sell property anywhere in the city for an actual cash consideration at any figure reasonably re-

lated to value. The use of the term value in this connection is not defined but presumbaly relates to structural value or actual investment. The testimony of this witness also was to the effect that the only sales of property for cash consideration that he knew of within the period since 1920 were sales at great sacrifice because the seller had to have the money. He testified that he had attended several [fol. 37] foreclosure sales within two or three years prior to the date of the hearing, that at none of these sales did anybody except the holder of the mortgage offer a bid, and that in some cases the mortgage holder's bid was less than fifty per cent of the amount of the judgment.

The City has also submitted an exhibit prepared by James S. Matteson, a Certified Public Accountant, constituting his report on his examination of the records of cash receipts and disbursements of the City of Washburn from January 1, 1921, to April 30, 1923, and of the county collections on delinquent tax rolls of the years 1920 and 1921. The 1920 tax roll with a small amount of penalties amounted to $117,681.03 of which $33,977.76 was delinquent. For 1921 the corresponding totals were respectively $109,810.34 and $29,416.18. In 1922 the total tax roll had declined further to $96,802.84 of which $27,645.69 was delinquent. This report shows that at June 30, 1923, there were held by the county tax certificates against the 1920 assessment amounting to $5,736.22 from which no cash had been realized, and against the next year's assessment $11,523.14. Personal property taxes charged back to the City amounted in these two years respectively to $1,207.88 and $1,433.16.

All of these figures are evidence of what is a well known fact, that the City of Washburn has suffered one of the most disastrous reverses in the history of Wisconsin cities. Property values have been reduced to a fraction of their former level; the market for property is almost dead; foreclosure sales are frequent, and tax delinquencies are relatively enormous. Probably every piece of property in the City of Washburn has suffered a great decline in value. Since the hearings in this case, there have been further developments in the city involving both of the banks which have still further aggravated the situation. Unless some artificial rule of valuation is to govern, it cannot be held,

[fol. 38] so far as we know, that any property in the city has been free from the effect of this severe slump in values. The value of the property of the Washburn Water Works Company cannot be determined independent of conditions which fix the value of other property in the city. While it is probably true that public utility properties must be valued to some extent on principles other than those which control commercial valuation, we do not see how a public utility property can escape a part of the loss involved in any such general decline as has taken place at Washburn. Certainly there must be a point on the scale at which the decline of population, industry and wealth in a municipality will effect the value of the utilities situated in that city. We believe that this point has most distinctly been reached in Washburn so far as the water works property is concerned. We cannot conceive of this property having a commercial value in any way approximating its present-day cost of reproduction, such cost less depreciation, or even the original investment. To hold that evidence as to the cost or value of the physical property is now controlling would be to deny that economic changes affect value of public utility property, for which denial we find no basis either in law or economics.

The earnings of a public utility are not necessarily an indication of value, although under some conditions they have considerable bearing on the subject. The last report of the Washburn Water Works Company which has been filed with the Commission is for the year ended December 31, 1922. This report shows a total income available for interest, dividends and surplus amounting to $1,422.69, against which the interest requirements alone were $6,-560.00, leaving a deficit of $5,137.31 for the year's operation. In October of that year the Commission entered an order authorizing the Company to increase certain of its [fol. 39] rates by amounts of from 20 per cent to 25 per cent. By that order the charge for fire protection was placed at the amount which the Company has reported for the year 1922. Twenty per cent would probably measure the total increase in rates other than for fire protection. This would amount to approximately $2,200.00 and if effective during 1922 would have reduced the deficit to a little under $3,000.00. The total possible economies so far as we can determine would not be sufficient to entirely remove the

deficit, and in order to eliminate even the greater part of the deficit a very substantial decrease in the cost of coal would have to be accomplished.

The rates fixed by our order of October, 1922, are among the highest in the State. The fire protection charge, based on the 1920 census, is about $1.86 per capita and the charges for commercial service are considerably above the general run of such charges. Under these conditions the fact that the company could not have earned, during the last year for which it has made a report to the Commission, enough to pay the interest on its bonds, even after giving effect to the increased rates at the present high level, seems to us good evidence that the property as a going concern is not worth anything like the amount which would be indicated by a study of the estimate of original cost or of the cost of reproduction on various price bases.

The Company has submitted in its brief a computation of accumulated deficits from which it apparently concludes that about $129,000.00 represents the sacrifice represented by the property up to January 1, 1923. This computation is made upon a basis which was formerly employed to some extent by the Commission and which within proper limits has a value. The present case is one which reduces it to an absurdity because the greater the deficits which a concern has experienced the greater the apparent value indicated by the computation. The result of such a computation, un- [fol. 40] less restricted to a normal development period and unless used in connection with a concern which has reached a profit making point, confuses value with investment or sacrifices, although they may not be at all the same thing and although the extent of one may not be any measure of the other.

The City has introduced some testimony dealing with certain property which it contends is no longer used and useful. The record is not very clear as to just how much of the physical property might be properly eliminated, but, inasmuch as figures relating to the physical property cannot be controlling in the determination of this case, we consider the matter of minor importance. The important fact, from our viewpoint, is that the Washburn Water Works property is located in a city in which every other class of property has suffered a great decline in value; that there are no prospects, so far as we can determine, that such decline is tem-

porary or that substantial values will be re-established. To hold that the water works property has not suffered this decline would be to ignore the facts. Certainly no purchaser having freedom of action would pay for this water works property anything like the original investment or the present cost of reproduction. What he would pay is not so easy to determine. In fact, it is rather hard to think of a condition in which such a purchaser would consider the property under any conditions, although it is not inconceivable that it might have a buyer at some figure very much less than any amount which we have discussed relating to the value of the physical property, unless it might be the value less depreciation as determined by the American Appraisal Company.

The 1923 report of the company had not been filed with the Commission at the date of preparation of this opinion and we had no evidence before us in connection with such preparation as to the amount expended for property additions subsequent to November 1, 1922, nor as to materials and supplies on hand at the date of this finding. The value [fol. 41] herein determined, therefore, is the value of the property not including additions made subsequent to November 1, 1922, and not including materials and supplies. In case the parties are unable to agree as to these amounts, the Commission will determine them upon request.

It is our conclusion and we hereby find that the just compensation to be paid by the City of Washburn for the taking of the property of the Washburn Water Works Company actually used and useful for the convenience of the public as of the date of this finding, not including additions to property made since November 1, 1922, and not including materials and supplies, is $50,000.

Dated at Madison, Wisconsin, this 10th day of April, 1924.

Railroad Commission of Wisconsin. Adolph Kanneberg, Lewis E. Gettle, A. R. McDonald, Commissioners.

[fol. 42] EXHIBIT "B" TO BILL OF COMPLAINT

To the Railroad Commission of Wisconsin:

Attached hereto and submitted herewith is a schedule of rates to become effective in the City of Washburn, Bayfield

County, Wisconsin, on January 1, 1928, for water used and consummated and for service rendered and to be rendered by the undersigned, the same being filed pursuant to the provisions of Section 196.20.

The schedules referred to are the following:

1. Estimate of gross revenue required by the undersigned.
2. Average operating expenses for five years.
3. Gross revenue for five years.
4. Proposed rate schedule to produce the required revenue.
5. Estimate of revenue to be produced from the rates proposed.

Respectfully submitted.

W. G. Maxcy, Receiver Washburn Waterworks Company.

[fol. 43] W. G. Maxcy, Receiver of Washburn Water Works Co.

Average Operating Expenses for Five Years

1922

Pumping	10,981.81
Distribution	931.15
Commercial	299.66
General	506.73
Undistributed	244.41
Taxes	2,812.74
Total	15,776.50

1923

Pumping	9,430.41
Distribution	1,186.89
Commercial	181.05
General	979.43
Taxes	2,903.87
Total	14,681.65

1924

Pumping	10,016.68
Distribution	774.04
Commercial	94.19
General	3,742.92
Taxes	3,263.00
Total	17,890.83

1925

Production	7,923.06
Distribution	1,248.86
Commercial	306.89
General	1,706.26
Taxes	3,575.00
Total	14,760.07

1926

Pumping	6,791.30
Purification	32.57
Distribution	997.48
Commercial	953.50
General & Misc.	2,048.45
Taxes	2,580.10
Total	13,403.40

Average

1922	15,776.50
1923	14,681.65
1924	17,890.83
1925	14,760.07
1926	13,403.40
5 year total	76,512.45
Average	15,302.49

[fol. 44] W. G. Maxcy, Receiver of Washburn Water Works Company

Gross Revenue for 5 Years

1922

Meter Sales	577 39
Flat Rate Sales	10,507 88
Fire Protection	6,900 00
Total	17,985 27

1923

Meter and Flat Rate Sales	11,084 02
Fire Protection	3,496 15
	14,580 17

1924

Meter and Flat Rate Sales	12,078 91
Fire Protection	7,070 40
	19,149 31

1925

Meter Sales	1,526 34
Flat Rate Sales	10,199 09
Fire Protection	7,070 40
	18,795 83

1926

Meter Sales	1,646 73
Flat Rate Sales	9,151 61
Fire Protection	7,197 90
	17,996 24

Average

1922	17,985 27
1923	14,580 17
1924	19,149 31
1925	18,795 83
1926	17,996 24
5 year total	88,506 82
Average	17,701 36

[fol. 45] W. G. Maxcy, Receiver of Washburn Water Works Co.

Estimate of Gross Revenue Required, Including Depreciation, to Net 7% Return on Plant Value of $130,000.00

Income

7% return on $130,000.00	9,100 00
Average operating expenses for years 1922-1923-1924-1925-1926, see schedule	15,302 49
Estimated additional personal property tax on $80,000.00 at 5.15	4,120 00
Estimated additional U. S. Income tax on additional income	958 50
Estimated additional Wisconsin Income tax on additional income	432 00
Estimated Legal and Railroad Commission expense	1,000 00
Executive Officers Salary	1,200 00
Depreciation at 1% on physical valuation placed on plant by Engineers of Railroad Commission	1,141 81
Total	33,254 80

The following rate schedule and estimate of requirements of revenue, etc. have been made upon the basis of present tax rates and are subject to the further condition that should the taxes or the tax rate be increased in the city of Washburn during any year, any additional taxes which shall become payable and not included in the foregoing

estimates shall be added to and be and become additional hydrant rentals to be payable by said city, and in the event that the taxes or the tax rate during any given year are less than those estimated in the attached schedule a corresponding reduction and credit shall be given upon the hydrant rentals to the extent of such saving in taxes.

[fol. 46] W. G. Maxcy, Receiver of Washburn Water Works Company, Washburn, Wis.

Water Rates

Commercial Service

Meter Rates:

	Old	New
Minimum Quarterly Charge	3.00	4.80
First 75,000 Gal. used per quarter	.50	.80
Next 100,000 Gal. used per quarter	.25	.40
All over 175,000 Gal. used per quarter	.20	.32

Flat Rates:

	Per year	
Bankers	9.60	15.00
Bakeries, daily average each bbl. flour used per bbl.	4.80	8.00
Barber Shop—each chair	9.60	15.00
Baths, private, per tub	6.00	10.00
Baths, public, per tub	12.00	19.00
Baths, Hotel or Boarding House, per tub	8.40	13.00
Blacksmith Shop, each fire	4.80	8.00
Boarding Houses, per room	3.00	5.00
Offices with wash basins	9.60	15.00
Printing Offices, 6 hands or more, per hand	24.00	38.00
Residences, one family, 4 rooms or less	12.00	19.00
Residences, one family, each add'l room	1.20	2.00
Residences, two families	18.00	29.00
Stables, private, including washing carriages, one horse	5.40	9.00
Stables, private, each additional horse or cow	1.80	3.00

	Per year	
Stables, livery, boarding or sale including carriage washing, per horse	2.40	4.00
Steam Boiler, per horse power	6.00	10.00
Saloons	30.00 to 60.00	48.00 to 96.00
Wash basins, self closing	3.60	6.00
Stores and shops	12.00 to 36.00	19.00 to 58.00
Urinals, private, self closing	3.60	6.00
Urinals, public, self closing	8.40	13.00
Water closets, private	6.00	10.00
Water Closets, public hotels, saloons and stores	12.00	19.00
Season Rates:		
Sprinkling lawns with 1/8 inch nozzle four hours a day, 50 ft. front or less	9.00	14.00
Street corner lots measurement on both fronts for street sprinkling in addition to lawn sprinkling, per ft.	.06	.10
Per year	30.00	48.00
Private Fire Protection DD Fire Hydrants:		
Inside fire protection will be charged in proportion to the size of the pipe leading into the building:		
2 inch pipe	24.00	38.00
3 inch pipe	42.00	67.00
4 inch pipe	60.00	96.00
6 inch pipe	120.00	192.00
8 inch pipe	180.00	288.00

[fol. 47] Public Fire Protection Service:

Additional hydrant 7¢ per lineal foot of pipe, plus a fixed charge of $7.50 per hydrant for each hydrant added.

New rate 12¢ per lineal foot of pipe and $12.00 per hydrant.

All costs of connections to mains and all piping and hydrants to be paid for by consumers.

Building Purposes

	Old	New
Stone per cord	18 cents	29 cents
Brick per 1,000	12 cents	19 cents
Plastering, per 100 sq. yds.	30 cents	48 cents
Sidewalks, 5 ft. x 4" per lineal ft.	01.2 cents	02 cents
Brick street, concrete base per lineal ft.	03.6 cents	06 cents
Asphalt street, concrete base per lineal ft.	03.6 cents	06 cents
Tar Macadam, concrete base per lineal ft.	03.6 cents	06 cents
Common Macadam, based per lineal ft.	02.4 cents	04 cents
Street work prices on street 32 ft. wide	.....	.....
Sewer work per lineal foot for each foot in depth	01.8 cents	03 cents
Concrete walls, same as price for stone	18 cents	29 cents
Cement curb and gutter, per lineal foot	06 cents	10 cents

[fol. 48] EXHIBIT C TO BILL OF COMPLAINT

(Title and recitals omitted)

On April 10, 1924, a value of $50,000 was fixed as the just compensation to be paid by the City of Washburn for the taking of the property of the Washburn Water Works Company used and useful for the convenience of the public. The merits of this finding are now before the court. As pointed out in the opinion issued at that time, "* * * the Washburn Water Works property is located in a city in which every other class of property has suffered a great [fol. 49] decline in value; that there are no prospects, so far as we can determine, that such decline is temporary or that sustantial values will be re-established. To hold that

the water works property has not suffered this decline would be to ignore the facts. Certainly no purchaser having freedom of action would pay for this water works property anything like the original investment or the present cost of reproduction."

The reproduction cost as of January 1, 1928, on a present price basis was found to be $114,089 while the reproduction cost less depreciation was $87,116. The reproduction cost on a split inventory basis was $71,530. For purposes of our computations in this case we have used a value of $75,000 as the fair value of the property for rate making purposes.

The use of this value, together with normal costs of operation, indicates that with the utility sharing in the general decline of property values in Washburn as it should, it will still be in a position, with operating conditions as discussed later, to provide a reasonable return thereon without materially modifying the existing rate structure.

We are of the opinion, from our investigation of the operating conditions at Washburn, that a considerable additional saving in the cost of pumping could be brought about by the installation of an additional pump and smaller motor. With the 125 H. P. motor now in use, driving the 1,000 gallon per minute pump, the demand upon the power company has resulted in a rate for energy of about four cents per kilowatt hours. The installation of a smaller pump and motor would decrease the demand and increase the period of pumping correspondingly.

Quotations from pump dealers indicate that a suitable triplex pump may be installed for approximately $2,500. Such a pump would prime itself when in proper working order and after starting might be left to run until cut off by an automatic switch. At present an operator remains [fol. 50] at the station during the pumping period and, in addition, during freezing weather is required to visit the station about three times a day to maintain a fire in a heating stove. The new arrangement would require the same visits, although remaining with the pump would not be required except to oil or grease the pump and to see it started and in proper working order.

It is not proposed to dispense with the large cert-ifugal pump for it is needed at times when the reservoir has an

insufficient supply of water for fires. In order to secure the lower rate for power the large motor and pump must be idle and with intelligent operation and fortunate distribution of large fires or other necessity of operating the large pump a substantial saving may be made. The margin appears to be sufficient to write off the fixed charges and the cost of additional equipment and labor of installation within afew years assuming occasional use of the large pump and motor now installed. With wise handling, proper installation and cooperation, and favorable circumstances, the saving may amount to two thousand dollars a year.

An examination of the reports filed with the Commission for the five year period ended December 31, 1927, shows pumping costs to have varied as follows:

1923, 155,815,000 gallons pumped at a cost of	$9,430.41
1924, 146,052,000 gallons pumped at a cost of	10,016.68
1925, 135,961,000 gallons pumped at a cost of	7,923.06
1926, 97,311,000 gallons pumped at a cost of	6,823.87
1927, 68,550,000 gallons pumped at a cost of	6,558.83

During 1926 the electric pump noted above was placed, but 1927 was the first year of all electric pumping, steam being used for stand-by service only.

If the installation of the smaller pump had been made early in 1926, it appears reasonable to assume that the utility would have saved about $2,000 per year in the interim. With fixed costs of $350.00 per year on this additional investment, the installation and carrying costs would [fol. 51] have been more than offset by the saving in power costs. The management certainly cannot be commended for not investigating the possibility of this saving, especially in view of the fact that it is contended the utlity has not earned a reasonable return.

This Commission in previous decisions called attention to the need of installing meters upon at least the larger customers. A considerable part of the excessive pumpage year after year can be attributed to no other cause than the lack of restraint on customers as regards the waste of water. By January 1, 1923, only 51 meters were in use. During 1925 21 additional were installed, while in 1926 40 more were placed. During 1927, 44 meters were set, making a total of 156 metered and 369 unmetered customers

on December 31, 1927. We believe the decrease in pumpage noted above is due largely to the installation of meters.

In estimating normal operating expenses we have carefully examined such data as were filed by applicant, the annual reports submitted not being strictly in accordance with the Commission's uniform classification of accounts, and hence not presenting the actual cost of operation for each period. Further, during the last five years particularly, considerable sums have been charged to operation covering disbursements incurred fighting this Commission's orders. Totals of these items will not be considered in determining the normal cost of operating the Washburn property. The cost set forth below assumes a net saving due to installing the additional pump of $1,650 per year. The other operating expenses are based upon our estimate of the normal average cost of distribution, commercial, and general costs.

[fol. 52] Estimated Operating Results, 1928

Revenues	$17,720.40
Expenses:	
Pumping	4,908.00
Distribution	1,080.00
Commercial	525.00
General	1,675.00
Total above	8,188.00
Retirement (Dep.) expense	937.50
Taxes (1927 payable 1928 based on $75,000)	3,742.82
Interest and return (7% on $75,000)	5,250.00
Total cost of operation and return	$18,118.32
Deficit	$397.92

On the above basis we see no need of increasing the rates for general service. The deficit, we believe, should be made up by increasing the charge for fire protection service. From our knowledge of the prevailing financial conditions of business enterprises in Washburn it is apparent that the water utility is in a much better financial condition than other classes of business.

It is therefore ordered that W. G. Maxcy, Receiver for the Washburn Water Works Company, be and the same hereby is authorized to discontinue the present schedule of rates for public fire protection service supplied in the City of Washburn and substitute therefor the following charge:

Fire Protection Service

The City of Washburn shall be charged for fire protection service the sum of $7,618.32 per year, to cover the use of mains and hydrants up to and including the terminal hydrant and connection on each line of main existing on the date of this order.

For all extensions of fire protection service a charge of 10 cts. per lineal foot of pipe shall be assessed per annum on the basis of length of main put into use between hydrants placed, plus a fixed charge of $9.00 per hydrant set for each hydrant added to the system.

It is further ordered that rates for general service shall remain unchanged.

It is further ordered that the rates authorized herein shall become effective for service rendered subsequent to the date of this order.

Dated at Madison, Wisconsin, this 4th day of December, 1928.

Railroad Commission of Wisconsin. Adolph Kanneberg, A. R. McDonald, Lewis E. Gettle, Commissioners.

K:PAR:MB.

[fol. 53] Exhibit "D" to Bill of Complaint

W. G. Maxcy, Receiver of Washburn Water Works Co.

Rate Schedule

	Old	New
Fire Protection Service	7,070.40	13,059.34
Per lineal foot of pipe laid	.07	.10
Per Hydrant set	7.50	11.00

General Service, Meter rates:

	Old	New
Minimum quarterly charge	3.00	4.20
1st 75,000 gallon per quarter — per — gal.	.50	.70
Next 100,000 gallon per quarter	.25	.35
Over 175,000 gallon per quarter	.20	.28

Unmetered Service:

Banks	9.60	13.00
Bakeries, daily average each bbl. flour used, per bbl.	4.80	7.00
Barber Shops, each chair	9.60	13.00
Baths, private, per tub	6.00	8.00
Baths, public, per tub	12.00	17.00
Baths, hotel or boarding house per tub	8.40	12.00
Blacksmith shop — each fire	4.80	7.00
Boarding houses — per room	3.00	4.00
Offices with wash basins	9.60	13.00
Printing offices, 6 hands or more, per hand	3.60	5.00
Photograph galleries	24.00	34.00
Residences, 1 family 4 rooms or less	12.00	17.00
Residences, 1 family each additional room	1.20	2.00
Residences, 2 families	18.00	25.00
Stables, private, including washing carriages, one horse	5.40	8.00
Stables, private, each additional horse or cow	1.80	3.00
Stables livery, boarding or sale, including carriage washing, per horse	2.40	3.00
Steam Boiler, per horse power	6.00	8.00
Saloons	30.00-60.00	42.00-84.00
Wash basins, self-closing	3.60	5.00
Stores and shops	12.00-36.00	17.00-50.00
Urinals, private, self closing	3.60	5.00
Water closets, private, self closing	6.00	8.00
Urinals, public, self closing	8.40	12.00
Water closets, public hotels, saloons & stores	12.00	17.00

	Old	New
Season Rates:		
Sprinkling lawns with 1/8 nozzle 4 hrs. per day — 50 ft. front or less	9.00	13.00
Street corner lots measurement on both fronts for street sprinkling, in addition to lawn sprinkling per foot	.06	.09
Private Fire Protection Service:		
D. D. fire hydrants	30.00	42.00
Inside fire protection will be charged in proportion to size of Pipe leading into building:		
2″ pipe	24.00	34.00
3″ pipe	42.00	59.00
4″ pipe	60.00	84.00
6″ pipe	120.00	168.00
8″ pipe	180.00	252.00
Building Purpose-:		
Stone cord	.18	.25
Brick per 1000	.12	.17
Plastering per 100 sq. yards	.30	.42
Sidewalk 5 ft. 4″ wide per lineal foot	.12	.02
[fol. 54]		
Brick street, concrete base, per lineal foot	.036	.05
Tar macadam, concrete base, per lineal foot	.036	.05
Asphalt, concrete base, per lineal foot	.036	.04
Common macadam St. per lineal foot	.024	.04
Street work prices based on St. 32 ft. wide	.018	.02
Sewer work per lineal ft. for each foot in depth	.018	.02
Concrete walls, same as price for stone per cord	.18	.25
Cement curb and gutter, per lineal foot	.06	.08

[fol. 55] W. C. Maxcy, Receiver of Washburn Water Works Co.

Income

6% return on $110,000.00	6,600.00	
Average operating expenses for years 1922-3-4-5-6, see Schedule	15,302.49	
Estimated add. personal property tax on $35,000 at 5.15	1,802.50	
Estimated U. S. Income tax on adtional Income	621.00	13½% on 4,600.
Estimated Wis. Income tax on additional Income	333.00	based on 1927 rate
Estimated Legal & Railroad Commission Expense	1,000.00	
Executive officer's salary	1,200.00	
Depreciation at 1% on temporary value of $110,000.00	1,100.00	
	$27,958.99	

[fol. 56] In United States District Court

Affidavit of W. G. Maxcy

W. G. Maxcy, being first duly sworn, on oath says that he is the Receiver of the Washburn Water Works Company and one of the plaintiffs in this action, and as such makes this affidavit for and in behalf of himself as Receiver and in behalf of said Washburn Water Works Company.

Affiant has been in the water utility business as an owner and operater of water works properties since 1899, and during the period since said date has been continuously operating various properties, including the Washburn Water Works property, a water utility at Antigo, Wisconsin, one at Menomonie, Wisconsin, one at Stevens Point, Wisconsin, one at Oshkosh, Wisconsin, one at Manitowoc, Wisconsin, one at Janesville, Wisconsin, one at Kankakee, Illinois, and one at Washington, Indiana, and has also operated water utilities at Baraboo, Wisconsin, Portage, Wis-

consin, and Beaver Dam, Wisconsin, as Receiver during such period.

[fol. 57] By reason of the experience thus obtained in said business, affiant is familiar with the operating requirements and with the best methods of operation and management of such plants, having in the course of such experience dictated the policies with reference to the plants under his control.

Affiant further says that most of the plants above referred to have been sold as a result of negotiations carried on by this affiant, and that in the case of each one of the plants so sold the ultimate sale price substantially reflected the then cost of reproducing the plant, and while such sale price was arrived at by different means as to different plants, the ultimate check or guide to determine the reasonable sale price was invariably the cost of reproducing such plant less the accrued depreciation. To such items were invariably added items for working capital and for going value of the plant.

Affiant further says that the Washburn Water Works plant cannot be operated upon a basis of the estimated operating results produced by the Commission on page 5 of its decision of December 4, 1928, and that said plant cannot be operated for less than the amount set forth in Exhibit B attached hereto, being the rate schedule filed and proposed by the affiant as Receiver on December 12, 1927. That for at least ten years the present plant of the Washburn Water Works Company has not earned a fair return upon the value of the property devoted to the public use, and in many of those years there has been an actual deficit, with the result that this affiant, as the managing officer of said plant before receivership, and as Receiver since such receivership, has found it necessary to cut the operating expenses in every way possible, and it is the judg-

[fol. 58] ment and opinion of this affiant that the operating expenses cannot be reduced below those estimated in connection with the rate schedule filed December 12, 1927, and cannot be reduced to even approach the estimated operating results referred to in the Commission's decision.

In submitting the rate schedule of December 12, 1927, affiant made a careful study of the operating history of the plant and is convinced that the estimates made therein as

to the revenue derived under the rates proposed is conservative and will not be exceeded in actual application; that said rates are necessary if the service now being furnished to the City of Washburn is to be continued and if the bondholders and the owners of the stock of the Company are to be protected.

Without waiving the claim made in the complaint herein that the Company is entitled to earn 8% upon $130,000.00 of value of the property of the Washburn Water Works Company, as set forth in the complaint, and in order to provide a very minimum of return to take care of operating expenses and interest requirements pending the trial of this case, affiant has prepared a temporary schedule which will produce a rate of return of but 6% upon $110,000.00 of value, which affiant proposes to put into operation pending the final disposition of this case before this Court; such schedule has been carefully checked with operating history and will not produce in excess of 6% upon $110,000.00 in addition to operating expenses, taxes and depreciation. Said schedule is hereunto attached, marked Exhibit D, and made a part of this affidavit, and this affidavit is made for the purpose of supporting an application for a temporary [fol. 59] restraining order to be issued by the court herein enjoining and restraining the defendants, and each of them, from interfering with the collection of the rates so fixed pending the final trial and determination of the issues in this case, and restraining and enjoining the defendants from commencing any action for the recovery of penalties or forfeitures because of, or on account of the billing and collecting for water service furnished the City of Washburn under the proposed schedule pending the final trial and disposition of this case, and to that end and in order that the public may be fully and adequately protected, and that full justice and equity may be done, affiant proposes to furnish such bonds or undertakings from time to time as this Court may require, conditioned upon, and providing for the repayment of any sums of money collected under such rate schedule while such restraining order is pending, which shall be found by the Court on the final trial, or at any other time, to be excessive or greater than the affiant, as such Receiver, is entitled to charge.

To support this application affiant also refers to and hereby expressly incorporates as part of this affidavit the verified complaint in this action.

(Signed) W. G. Maxcy.

(Jurat omitted.)

Service by copy of the within complaint and order this 3rd day of January, 1929 is hereby admitted for all defendants.

John W. Reynolds, Attorney General; Suel O. Arnold, Assistant Attorney General, Attorneys for Defendants.

[fol. 60] IN UNITED STATES DISTRICT COURT

RESTRAINING ORDER—Filed January 2, 1929

This cause came on this day to be heard before the Hon. Claude Z. Luse, Judge of the District Court of the United States for the Western District of Wisconsin, upon plaintiffs' application for a temporary restraining order.

Upon the verified bill of complaint filed by plaintiffs, and the affidavit of W. G. Maxcy, in support thereof, it appearing that plaintiffs are now being required to operate their public utility property in the City of Washburn under grossly inadequate and confiscatory rates in violation of the Fourteenth Amendment to the Constitution of the United States and that irreparable loss and damage will thereby result to the plaintiffs unless a temporary restraining order is granted; that the irreparable loss and damage aforesaid will follow because of and as a result of the operation of said water plant as shown by the bill filed herein, at inadequate rates, and that unless such rates are charged and collected in advance, it is difficult and in many cases impossible to collect such charges at a later date, or to collect additional charges at a later date, with the result that unless [fol. 60a] a temporary restraining order is granted, such increased revenue to which the plaintiffs may be entitled following the trial of this case on the merits, will be lost in the intervening period.

The plaintiffs herein having appeared by their solicitors H. L. Butler and R. M. Rieser, and the defendants having

appeared by Suel O. Arnold, Assistant Attorney General,

Now, upon plaintiffs undertaking to refund to consumers of water in said city of Washburn any sums collected by them in excess of rates now being charged in said city of Washburn, which on the hearing and determination of plaintiffs' application for a temporary injunction herein may be found to have been wrongfully collected, the Court finds that a temporary restraining order should issue as prayed in the bill of complaint herein.

It is therefore ordered that the defendants and each of them and their respective successors in their respective offices, be and they are hereby restrained and enjoined until the hearing and determination of the application for a temporary injunction herein or until the further order of the Court, but not beyond ten days beyond the date hereof unless extended by later order, first, from enforcing and attempting to enforce against plaintiffs a certain order of the Railroad Commission of Wisconsin, made on the 4th day of December, 1928, wherein the defendant Railroad Commission of Wisconsin fixed the rates which the plaintiffs might charge for services in said city; second, from interfering or attempting to interfere with plaintiffs in collecting or charging rates in excess of those fixed by said Commission but not in excess of the rate set out in the Schedule attached to the complaint herein and marked Exhibit "D," and third, from instituting or authorizing or directing the institution of any suit, action or actions, against plaintiffs or the agents or officers of the respective plaintiffs, for the recovery of any penalty under or by virtue of the Statutes [fol. 61] of Wisconsin, by reason of the charging or collecting by plaintiffs of rates set out in the said schedules.

It is further ordered as a condition to granting this order that pending the hearing and determination of the application for a temporary injunction herein, the plaintiffs shall charge rates no higher than those set out in said exhibit marked Exhibit "D," attached to plaintiffs' complaint herein.

It is further ordered that before existing rates in said city are changed and before the rates set out in the attached schedule are put into effect, the plaintiffs shall deliver and file with the Clerk of this Court their undertaking with corporate or other sufficient surety approved by this Court

in the sum of $2,000.00, and a like undertaking in like amount every thirty days hereafter so long as this restraining order is in effect or until the further order of the Court, such undertakings are to be conditioned for the repayment by plaintiffs to consumers of such city of any and all sums collected for water which, on the hearing and determination of the application for a temporary injunction herein, may be found to have been wrongfully collected such repayment to be made by credit in the Company's books or by payment of cash and further conditioned upon the payment of such costs and damages as may be incurred or suffered by any party who may be found to have been hereby wrongfully enjoined or restrained.

Dated this 3rd day of January, 1929, at 2 P. M.

By the Court:

C. Z. Luse, District Judge.

Let this order be entered. C. Z. Luse.

[fols. 62 & 63] Here appears Bond filed upon issuing the Preliminary Restraining Order and approved by the District Judge.

[fol. 64] IN UNITED STATES DISTRICT COURT

STIPULATION RE EXTENSION OF RESTRAINING ORDER AND ORDER THEREON—Filed January 12, 1929

Whereas it appears that the Honorable C. Z. Luse, Judge of this Court has been unable to obtain the services of two additional judges to hear the application for temporary injunction in the above entitled action, and has been unable to obtain a convenient date for the hearing thereof,

Now, therefore, it is hereby stipulated by and between the parties to the above entitled action that an order may be entered upon presentation of this stipulation, extending and continuing the temporary restraining order herein entered for an additional ten days, and that, if at the end of said time, said judge shall still be unable to obtain the services of such judges, a similar order may be entered upon the minutes of the Court, extending such temporary restraining

order for an additional ten days and thereafter for additional ten day periods until the Court shall be able to convene with the three members, provided, however, that the plaintiffs herein shall deposit with the Court at the end of [fol. 65] every thirty day period an additional undertaking in accordance with the provisions of the original restraining order; and the order or orders herein provided for may be entered without notice to any or either of the parties hereto.

Dated January 10, 1929.

H. L. Butler, R. M. Rieser, Solicitors for the Plaintiffs. John W. Reynolds, Attorney General; Suel O. Arnold, Assistant Attorney General, Attorneys for the Defendants.

Upon the annexed and foregoing stipulation,

It is hereby ordered that the temporary restraining order entered herein on the 3rd day of January, 1929, be and it is hereby extended and continued for an additional ten days.

Dated January 12, 1929.

By the Court:

C. Z. Luse, Judge.

[fols. 66 & 67] Here appears Bond filed in connection with Extension of Restraining Order.

[fol. 68] IN UNITED STATES DISTRICT COURT

ANSWER—Filed February 15, 1929

The answer of the above named defendants to the bill of complaint of the above named plaintiffs respectfully shows *on* to the court:

I

Defendants admit the allegations set forth in paragraph I of said bill of complaint.

II

Defendants admit the allegations set forth in paragraph II of said bill of complaint.

III

Defendants admit the allegations set forth in paragraph III of said bill of complaint.

IV

Defendants admit that the matter in controversy, exclusive of the interest and costs, exceeds the sum of Three Thousand ($3,000.00) dollars, but deny that the plaintiffs [fol. 69] have been or are being deprived of their property by the state of Wisconsin without due process of law, or are denied the equal protection of the law. Defendants further deny that this action is one arising under the constitution and laws of the United States.

V

Defendants admit that the state of Wisconsin has enacted laws, and now has upon its statute books, laws which are set forth in substance in paragraph V of said bill of complaint, except that the defendants deny that there is no provision in the statutes of Wisconsin in any manner providing for reimbursement to the utility for losses which it may sustain while its complaint is pending or undecided, or for any losses it may have sustained by reason of the failure of said commission to provide adequate rates, or to authorize charges which would be a fair return upon the value of the company's property, and allege that the railroad commission has power to consider such matters in the determination of rates, and to provide for past losses which may have been incurred in such manner.

VI

Defendants admit the allegations set forth in paragraph VI of said bill of complaint.

VII

Defendants admit that an order was entered by the railroad commission in 1910 establishing a new schedule of rates for the Washburn Water Works Company. Defendants deny that in said order the investment cost of the

property of the Washburn Water Works Company before depreciation, was fixed at $69,348.00, and depreciated at $63,803.00. Defendants allege that in said order a value of $69,342.00 was placed on the property of the Washburn Water Works Company based upon reproduction new, and that a value depreciated upon the same basis was fixed at $63,803.00. Defendants admit that said rates so established [fol. 70] in 1910 remained in effect until October, 1921, at which time a new rate schedule was established by the railroad commission.

VIII

Defendants admit that as a part of the decision of the railroad commission establishing a new schedule of rates in October, 1921, the commission made the statement set forth in paragraph VIII of said bill of complaint. Defendants admit that in the same proceeding the commission reproduced the plant's value from year to year by adding to the value in a given year the additions during the preceding year. Defendants admit that the 1910 valuation of $69,518.00, based on cost of reproduction, new, was increased to $74,263.00 in the year 1916, and was increased to $80,792.00 in the year 1921. Defendants admit that the greater portion of the property of the Washburn Water Works Company was acquired and in place prior to the War period.

IX

Defendants admit the allegations set forth in paragraph IX of said bill of complaint, and allege that the depreciated value of the property of the Washburn Water Works Company, based on the average prices for the year ending June 30, 1923, was $114,181.00.

X

Defendants deny that on December 12, 1927, the Receiver, as one of the plaintiffs in this action, filed with the railroad commission a schedule of rates providing an adequate return upon the property of the Washburn Water Works Company actually devoted to the public service. Defendants admit that the receiver attempted to file with the railroad commission said schedule, attached to the bill of complaint marked Exhibit "B." Defendants allege that

the rates set forth in said schedule were excessive, unreasonable and unlawful. Defendants admit that the commission refused to accept such schedule for filing, and refused to suspend the schedule of rates then in effect. Defendants deny that the commission in refusing to accept said sched-
[fol. 71] ule of rates for filing, neglected to perform the duties prescribed by the statutes of Wisconsin, or violated the statutes of the state of Wisconsin.

Defendants admit that following the attempt of the receiver to file such schedule with the railroad commission, the plaintiff receiver filed an application with the commission for an increase of rates, and predicated the demand for such increase upon the same facts as were contained in the schedule of rates submitted to the commission for filing. Defendants admit that thereafter the plaintiff receiver brought said proceedings to a hearing before the commission.

Defendants allege that they have no information sufficient to form a belief as to the truth of the allegations set forth in paragraph X of said bill of complaint, to the effect that ever since the attempt to file said rate schedule with the commission, the plaintiff receiver in making billings to customers reserved the right to collect on the basis of the rate schedule attempted to be filed with the commission, and has continuously and always asserted that such rate schedule was actually in force and effect, and, therefore, put plaintiffs to their proof regarding the same.

Defendants admit that following the taking of testimony in support of the application filed by the plaintiff receiver with the commission, the commission on the 4th day of December, 1928, made and filed its decision upon such application, a copy of which decision is attached to the bill of complaint and marked Exhibit "C."

XI

Defendants admit that in the decision of the railroad commission dated December 4, 1928, a value of $75,000.00 was placed on the property of the Washburn Water Works Company. Defendants allege that the reproduction cost of the property of the Washburn Water Works Company on a present price basis was found by the commission in said order to be $114,089.00, while the reproduction cost, less de-

preciation, was found to be $87,116.00. Defendants allege [fol. 72] that the production cost of said property on a split inventory basis was found to be $71,530.00. Defendants deny that the commission in establishing the value of $75,000.00 disregarded materials and supplies, working capital and going value, and allege that said value of $75,000.00 includes materials and supplies, working capital and going value. Defendants deny that in 1925 the commission estimated working capital to be $3,000.00, and allege that said figure included working capital, materials and supplies. Defendants deny that in arriving at the value of $75,000.00, the commission resorted to arbitrary, unjust or unfair methods.

Defendants admit that in arriving at said value of $75,000.00, the commission disregarded the 4% sinking fund method of computing depreciation, but deny that the commission in establishing said value of $75,000.00 adopted the straight line method of depreciating the property of the company. Defendants deny that the method of computing depreciation was adopted by the commission to overcome the decision of the Wisconsin supreme court in the Waukesha Gas Case, 195 Wis. 565, by increasing the depreciation so as to reduce the value, and to reflect a value below the true depreciated value of the property.

Defendants admit that the figures submitted in 1922 by the engineers employed by the commission showed that the average per cent of original condition of depreciated property was 85.7%, and that this percentage was approved by the commission. Defendants admit that in the 1928 valuation, the average per cent of original condition of depreciated property is 76%. Defendants admit that between 1922 and 1928 new property was added to the property of the Washburn Water Works Company, but deny that said additions offset depreciation accruing subsequent to 1922. Defendants allege that the method adopted and now used by the commission in computing depreciation is a proper and lawful method.

Defendants admit that between 1923 and 1928 an additional investment of approximately $3,000.00 was made in the property of the Washburn Water Works Company. [fol. 73] Defendants admit that the cost of reproducing the property of the Washburn Water Works Company in 1923, based upon spot or present day prices, was found by the

commission to be $132,862.00 undepreciated. Defendants admit that in the year 1928 the commission found that the cost of reproducing the property of the Washburn Water Works Company was $114,089.00. Defendants deny that the difference between the reproduction cost as determined in 1923 and in 1928 cannot be supported upon the evidence in the record before the commission. Defendants deny that said value of $114,089.00 is below or far below the actual cost of reproducing said property. Defendants deny that there has been but very little variation in the prices of material, labor and equipment entering into the cost of reproducing a water works plant between the year 1923 and the year 1928, and allege that there have been substantial variations in prices of said items between the years 1923 and 1928.

Defendants deny that the commission would have or should have arrived at a value of the plaintiffs' property devoted to the public use of not less than $130,000.00 had it taken into consideration all items and truly reflected the actual cost of reproducing the property on the basis of present day prices. Defendants allege that the commission in arriving at the figure of $114,089, as representing the cost of reproduction, new, took into consideration all proper items, and allege that said figure reflects the actual cost of reproduction undepreciated on the basis of present day prices. Defendants allege that in arriving at said figure of $114,089.00, it gave proper consideration to items of going-value, working capital, materials and supplies. Defendants allege that a value of $130,000.00 is exorbitant and does not reflect actual cost of reproducing the plaintiffs' property upon the basis of present day prices. Defendants deny that the plaintiffs are entitled to a substantial increase in rates, or any increase in rates, beyond that provided in the order of December 4, 1928, and deny that the plaintiffs are entitled to an increase equivalent to that set [fol. 74] forth in the rate schedule submitted to the commission in connection with its application for an increase of rates.

XII

Defendants admit that the commission proceeded to determine what in its judgment — a fair rate of return and what revenues would be required to take care of operating ex-

penses, based upon the value of $75,000.00. Defendants deny that the rate base of $75,000.00 was inadequately or improperly arrived at.

Defendants admit that the railroad commission discounted and reduced the actual operating expenses of the company by determining that it should install an additional electric pump. Defendants admit that at the hearing there was not sufficient evidence introduced to justify the reduction of expenses by the installation of an additional electrical pump. Defendants allege that subsequent to said hearing evidence was secured sufficient to justify said reduction of expenses and the installation of said additional pump. Defendants deny that the reduction of expenses and the installation of an additional electrical pump is not supported by the evidence. Defendants admit that the commission determined that more meters should be installed. Defendants allege they have no information sufficient to form a belief as to the truth of the allegation set forth in paragraph XII of said bill of complaint to the effect that the receiver is without funds to install meters, and that the installation of additional meters is not economical, and, therefore, put plaintiffs to their proof regarding the same.

Defendants admit that the commission arrived at an estimated net saving in pumping costs of $1,650.83, thus reducing pumping costs from $6,558.83, as shown by the annual report of 1927, to an estimated figure of $4,908.00. Defendants admit that the distribution, commercial and general expense was cut by the order of the commission in the amount of $2,718.45. Defendants deny that there is no evidence in the record to justify said reduction, and allege that said reduction is substantiated by evidence con- [fol. 75] tained in the record. Defendants admit that the reduction in expenses estimated by the commission amounted to $4,369.28. Defendants allege that the annual reports submitted by the Washburn Water Works Company are not in conformity with the uniform classification of accounts adopted by the commission, and do not present the actual cost of operation for each period. Defendants admit that the sums expended during the past five years by the Washburn Water Works Company in fighting the orders of the commission were not considered by the commission in determining the normal cost of operating the property of the Washburn Water Works Company. Defendants

deny that the commission made no allowance for federal or state income taxes, nor for purification expense, and allege that in said order provision is made for federal and state income taxes and for purification expense.

Defendants allege that the annual report for the year 1928 has not been submitted to the commission, and for that reason they have no information sufficient to form a belief as to the truth of the allegation contained in paragraph XII of the said bill of complaint to the effect that actual operation during the year 1928 shows that the pumping cost will be substantially as high as in 1927, and the remaining items of expense will also be as large or larger than the year 1927, and that the estimated expenses contained in Exhibit "B" attached to the complaint, will be met, if not exceeded, and, therefore, put plaintiffs to their proof regarding the same.

XIII

Defendants admit that the legal contests involving the validity of the orders of the commission respecting the Washburn Water Works Company have heretofore terminated favorably for the Washburn Water Works Company. Defendants admit that a portion of the legal expense has been incurred in collecting hydrant rentals, but allege that they have no information sufficient to form a belief as to the cost of said legal services, nor the cost of legal services in other matters incident to the management [fol. 76] of said company, and therefore, put plaintiffs to their proof regarding the same.

Defendants admit that if a thousand dollars be added to the actual operating expenses incurred during the year 1927, the resultant sum of $5,369.28 would exceed by one hundred dollars the total allowance fixed in the commission's order for interest and return. Defendants admit that the order of the commission shows that a return of $5,250 has been allowed to the Washburn Water Works Company. Defendants allege that if the property of the Washburn Water Works Company is managed and operated in compliance with the order of December 4, 1928, the return to the Washburn Water Works Company will amount to $5,250.00. Defendants deny that the Washburn Water Works Company is by said order denied all return. De-

fendants deny that the Washburn Water Works Company will be short $100.00 of making operating expenses under said order.

XIV

Defendants admit that there has been no increase in rates for the Washburn Water Works Company since 1921. Defendants admit that the commission in its order dated October, 1924, made the statement set forth in paragraph XIV of said bill of complaint.

Defendants deny that the books of the Washburn Water Works Company show no decrease in operating expenses subsequent to 1924. Defendants allege they have no information sufficient to form a belief as to the truth of the allegation contained in paragraph XIV of said bill of complaint that the operating expenses of the company prior to 1922 would appear substantially the same had the annual reports of the company been filed on an accrual basis rather than a receipt and disbursement basis and therefore put plaintiffs to their proof regarding the same. Defendants deny that the operating expenses have been cut by the receiver to the minimum, and allege that a substantial saving could have been effected in said operating costs. Defendants allege that they have no information sufficient to form a belief as to the truth of the allegation contained in paragraph XIV of said bill of complaint to the effect that there are no other means or funds with which the receiver could [fol. 77] function, and said funds are insufficient to pay amounts now outstanding for part of the receiver's salary, for attorneys' fees and for the Washburn Water Works Company, and, therefore, put plaintiffs to their proof regarding the same.

Defendants admit that the commission in denying an application for increased rates by the order dated November 30, 1925, made the statements set forth in paragraph XIV of said bill of complaint. Defendants admit that in two decisions of the commission preceding the 1928 decision, the commission found that the Washburn Water Works Company was not receiving sufficient revenues to earn a fair return upon a value based on cost of reproduction new, less depreciation. Defendants admit that the commission in entering its order dated December 4, 1928, had before it previous decisions, and also the evidence of the operating

expenses of the company for five years preceding January 1, 1928, as nearly as could be determined by the commission. Defendants admit that it appears from the schedule marked Exhibit "B" attached to the complaint, that the average operating expenses during the said five year period amounted to $15,302.49. Defendants admit that the said schedule shows operating expenses for the year 1927, exclusive of legal expenses, amounted to $16,197.33. Defendants deny that the item of $2,000.00 for legal expenses is properly chargeable to expenses for the year 1927.

Defendants deny that the operating expenses for the year 1927 should be considered at $17,197.33, exclusive of legal expenses, and deny that said expenses should be considered at $18,197.33, including legal expenses. Defendants allege that they have no information sufficient to form a belief as to the truth of the allegation contained in paragraph XIV of said bill of complaint to the effect that the operating expenses during the year 1928 will not be substantially less than the operating expenses for the year 1927, and, therefore, put plaintiffs to their proof regarding the same. [fol. 78] Defendants admit that the operating expenses for the year 1927, as disclosed by plaintiffs' books, including depreciation and taxes, exceeded $18,000.00 for the year 1927. Defendants allege that said amount includes items which do not represent normal cost of operation, and allege that by proper management said operating expenses can be reduced to the amount estimated by the commission.

XV

Defendants admit that in arriving at their decision of December 4, 1928, the commission stated as reason for not accepting the report of expenses submitted by the Washburn Water Works Company that the actual pumping cost was too high.

Defendants admit that the commission recommended the installation of a smaller electric pump, which would be required to operate longer hours, which would improve the electric load factor and thereby reduce the rates charged for electric energy consumed. Defendants admit that at the time of the hearing the experts representing the commission stated that they had insufficient proof to warrant such conclusion. Defendants allege that subsequent to said

hearing, evidence was secured to show that the pumping cost could be reduced in accordance with the estimate of the commission. Defendants deny that there is no proof in the record supporting the conclusions of the commission, and deny that the conclusions of the commission are refuted by undisputed testimony in the record. Defendants admit that the commission in its order dated December 4, 1928, made the statements set forth in paragraph XV of said bill of complaint. Defendants deny that the findings of the commission are arbitrary or unreasonable. Defendants admit that the same justification for refusing a rate increase was adopted by the commission on November 30, 1925, and in previous decisions, wherein an electrically driven pump was recommended, and it was estimated that a saving in operating expenses could be made. Defendants [fol. 79] admit that the plaintiff receiver did install an electrically driven pump. Defendants admit that the commission found the pump to be too large, though useful at times of large fires. Defendant allege that the plaintiffs did not follow approved engineering methods in installing said electrical pump, and allege that had the proper installation been made, substantial savings in pumping costs could have been effected. Defendants admit that the estimated saving in pumping costs by the installation of an electrically driven pump, made in the order of November 30, 1925, was substantially $3,500.00 less than the actual cost. Defendants allege that had the proper installation been made, and the pump properly managed, the savings estimated by the commission in said order of November 30, 1925, could have been effected.

XVI

Defendants admit that for some years the plaintiffs did not earn a fair return upon a value of their property, based on cost of reproduction, new, less depreciation. Defendants allege that one of the reasons for such failure can be ascribed to the neglect of plaintiffs to apply to the commission for an increase of rates prior to the year 1921. Defendants allege that a further reason for said condition is due to a failure on the part of plaintiffs to install meters in 1910, at a time when the cost of such installation was relatively small. Defendants allege that said city has for many years been in a decadent and dying condition, that

said city has dwindled in size and will continue to shrink, and that the reason why capital cannot be interested in the venture of the Washburn Water Works Company is solely because of the economic conditions prevailing in the city of Washburn. Defendants deny that the order is confiscatory because it fixes the rate of return at 7% and not at 8%. Defendants allege that a return of 8% is unreasonable and exorbitant.

Defendants admit that the order of December 4, 1928, fixes the fair value of the plaintiffs' property at $75,000.00, [fol. 80] and admit that the value so fixed is less than the value fixed by the commission in previous years, and less than the actual investment of the plaintiffs in the property. Defendants deny that the commission omitted in said valuation of $75,000.00, the items of going value, working capital, and supplies, and allege that said items are included in said valuation of $75,000.00.

XVII

Defendants deny that the property of the plaintiffs has been or is now being economically operated. Defendants deny that the only criticism the commission has been able to make has been that the plaintiff should install additional meters. Defendants allege that the commission has repeatedly criticised the size of the pumping cost. The defendants allege that they have no information sufficient to form a belief as to the truth of the allegations contained in paragraph XVII of said bill of complaint to the effect that by reason of the nature of the business and the additional operating expenses incident to the reading of meters, repairing of meters, change or installation of meters, as well as other similar expense and the carrying cost of such property, it is not economical to install more meters, and that the saving incident to the use of meters is less than the sum of such items of expense, and, therefore, put plaintiffs to their proof regarding the same.

Defendants admit that the commission suggests in its order of December 4, 1928, that the cost of production of water is higher in Washburn than in other cities of the state, and that there has been a decrease in the population of the city during the recent past. Defendants admit that

the plaintiff's plant was and is well designed and constructed, that certain hydrants of which complaint was made were installed under direction of the city officials, and that there was no lack of reasonable or proper prudence in design or construction. Defendants deny that the decrease of population in the city has been only of the tem-
[fol. 81] porary population produced by the abnormal conditions existing in the city during the World War.

Defendants admit that the supreme court of the State of Wisconsin has rendered decisions referred to in paragraph XVII of said bill of complaint, but deny that the order of the commission is arbitrary or confiscatory, and deny that the commission has disregarded the judgment of the managers of the property. Defendants deny that the commission refused to consider the operating history of the company, and deny that the commission has substituted its judgment for the judgment of the managers of the property. Defendants deny that the order is unsupported by the evidence, and allege that the evidence does in fact sustain said order.

XVIII

Defendants deny that there will be required an annual revenue of $33,254.80 in order that the plaintiffs may realize a fair return upon the property devoted to the public use, and allege that said annual revenue would be unreasonable and exorbitant.

Defendants deny that the plaintiffs were entitled to file or enforce the rates set forth in Exhibit "B" attached to said bill of complaint.

Defendants deny that the commission in rendering its decision of December 4, 1928, ignored or violated any of the plaintiffs' rights, and deny that said order deprives the plaintiffs of any right or revenue to which they are legally entitled.

Defendants deny that said state of Wisconsin has in the past confiscated the plaintiffs' property or been responsible for the plaintiffs' present financial condition. Defendants deny that the plaintiffs are entitled to any relief by way of additional revenue or otherwise.

XIX

Defendants allege they have no information sufficient to form a belief as to the truth of the allegation contained in paragraph XIX of said bill of complaint to the effect that if the property of the plaintiffs is valued at $110,000.00, the tax burden will be increased by $1,802.50 figured on the [fol. 82] present rates of taxes in the city of Washburn, and, therefore, put plaintiffs to their proof regarding the same.

Defendants admit that if the property of the plaintiffs is valued at $110,000.00, additional revenue would be required to take care of U. S. income taxes and Wisconsin income taxes and return upon said value.

Defendants deny that a 6% return on a value of $110,000.00 is the minimum necessary to pay interest charges on existing indebtedness of the plaintiffs, and deny that an increase of revenues of $10,237.59 is necessary.

XX

Defendants deny that the rate schedule attached to the bill of complaint and marked Exhibit "D" is required for a fair return and allege that said schedule of rates will produce a grossly exorbitant return upon the fair value of the plaintiffs' property.

Defendants deny that a value for plaintiffs' property of $110,000.00 is inadequate and allege that said value is grossly exorbitant.

Defendants allege that the rates fixed by the commission in its order dated December 4th, 1928, are among the highest for water plants in the state of Wisconsin. Defendants allege that the schedule of rates set forth in Exhibit "D" are among the highest, if not the highest, for water plants in the State of Wisconsin.

XXI

Defendants admit that the rates prescribed in the commission's order of December 4, 1928, became effective for service rendered subsequent to the date of the order.

Defendants admit that a new period of hydrant rentals commenced on the first day of January, 1929, and that the

city pays hydrant rentals semi-annually on the first days of January and July of each year. Defendants deny that proper and efficient administration of any new rate schedule can be most economically made if the new rate schedule becomes effective on January 1, 1929.

[fol. 83] Defendants deny that it is important or imperative that the plaintiffs be immediately relieved from compliance with the order dated December 4, 1928. Defendants deny that said order is unjust, confiscatory or illegal.

Defendants deny that the plaintiffs will suffer injury or damage by being required to operate under the rates prescribed by the commission, and deny that its credit will be impaired or its property confiscated or its ability to render service impaired by the said order dated December 4, 1928. Defendants deny that any unusual emergency exists, and deny that there is any necessity for granting plaintiffs relief.

Defendants deny that the plaintiffs are in a perilous condition, and deny that the state of Wisconsin has at any time required them to operate under rates that are confiscatory.

Defendants admit that should plaintiffs attempt to charge rates higher than those fixed by the commission it would be their duty to enforce the penalties provided by law, but deny that such penalties are drastic, and deny that there would be a multiplicity of actions.

XXII

Defendants allege that under the laws of the state of Wisconsin plaintiffs may commence an action in the circuit court for Dane county against the railroad commission of Wisconsin to vacate and set aside any order of the said railroad commission of Wisconsin, on the ground that such order is unlawful or unreasonable, the statutory provisions for such action being as follows:

"196.41. Utility Dissatisfied; Action to Set Aside.—(1) Any public utility and any person or corporation in interest being dissatisfied with any order of the commission fixing any rate or rates, tolls, charges, schedules, joint rate or rates, or any order fixing any regulations, practices, acts

or service may commence an action in the circuit court for Dane county against the commission as defendant to vacate and set aside any such order on the ground that the rate or rates, tolls, charges, schedules, joint rate or rates, fixed in such order is unlawful, or that any such regulation, [fol. 84] practice, act or service fixed in such order is unreasonable, in which action the complaint shall be served with the summons.

"(2) The answer of the commission to the complaint shall be served and filed within ten days after service of the complaint, whereupon said action shall be at issue and stand ready for trial upon ten days' notice to either party.

"(3) Any person not a party to the action but having an interest in the subject thereof, may apply to the court to be made a party and thereupon the court shall order him to be brought in by the proper amendment.

"(4) All such actions shall have precedence over any civil cause of a different nature pending in such court, and the circuit court shall always be deemed open for the trial thereof, and the same shall be tried and determined as other civil actions."

"196.42. Action to set aside, Ninety Days For.—Every proceeding, action or suit to set aside, vacate or amend any determination or order of the commission or to enjoin the enforcement thereof or to prevent in any way such order or determination from becoming effective, shall be commenced, and every appeal to the courts or right or recourse to the courts shall be taken or exercised within ninety days after the entry or rendition of such order or determination, and the right to commence any such action, proceeding or suit, or to take or exercise any such appeal or right of recourse to the courts, shall terminate absolutely at the end of such ninety days after such entry or rendition thereof."

"196.43. Injunction Procedure.—(1) No injunction shall issue in any proceeding, action or suit, mentioned in section 196.42, suspending or staying any order of the commission, except upon application to the circuit court or presiding judge thereof, notice to the commission and any party interpleaded, and hearing; and no injunction shall issue in any other proceeding, action or suit in any court, which shall have the effect of delaying or preventing any order of the

commission from becoming effective, unless the parties to the proceeding before the commission in which such order was made are also parties to such proceeding, action, or suit in such court, or shall have been brought in and made parties in such manner as the court, or the presiding judge thereof, shall by order direct.

"(2) No injunction shall issue in any such proceeding, action, or suit suspending or staying any order of the commission or having the effect of delaying or preventing any order of the commission from becoming effective, unless an undertaking shall be entered into on the part of the plaintiff, by at least two sureties, in such sum as the court or the presiding judge thereof shall direct to the effect that the plaintiff will pay all damages which the opposite party may have sustained by the delay or prevention of the order [fol. 85] of the commission from becoming effective, and to such further effect as such judge or court shall in discretion direct, and no order or judgment in any such proceeding, action, or suit shall be stayed on appeal therefrom unless a like undertaking be entered into by the appellant in addition to the undertaking procided in section 3052."

"196.44. New Evidence; Stay; Refinding; Judgment.—(1), If, upon the trial of such action, evidence shall be introduced by the plaintiff which is found by the court to be different from that offered upon the hearing before the commission or its authorized agent, or additional thereto, the court, before proceeding to render judgment unless the parties to such action stipulate in writing to the contrary, shall transmit a copy of such evidence to the commission and shall stay further proceedings in said action for fifteen days from the date of such transmission.

"(2) Upon the receipt of such evidence the commission shall consider the same and may alter, modify, amend or rescind its order relating to such rate or rates, tolls, charges, schedules, joint rate or rates, regulations, practice, act or service complained of in said action, and shall report its action thereon to said court within ten days from the receipt of such evidence.

"(3) If the commission shall rescind its order complained of, the action shall be dismissed; if it shall alter, modify or amend the same, such altered, modified or amended order

shall take the place of the original order complained of, and judgment shall be rendered thereon as though made by the commission in the first instance.

"(4) If the original order shall not be rescinded or changed by the commission judgment shall be rendered upon sych original order."

Defendants allege that by virtue of the provisions of law above described, the plaintiffs, upon proper showing, would be entitled to an injunction suspending or staying the order of the railroad commission of Wisconsin.

Defendants allege that plaintiffs have a plain, adequate and complete remedy at law under the statutes and laws of the state of Wisconsin; that plaintiffs have not availed themselves of any of the remedies so provided by the laws of the state of Wisconsin, and that the plaintiffs are not entitled to equitable relief, and that the bill of complaint herein does not allege facts sufficient to grant unto this court jurisdiction of the cause of action or of the persons of the said defendants; that said bill of complaint is wholly without equity; that by plaintiffs' own showing they are not entitled to the relief prayed for against the defendants or to any relief arising from the facts alleged in said complaint.

[fol. 86] Defendants allege that the value of $75,000.00 fixed in the order of December 4, 1928, is a fair value of the plaintiffs' property devoted to the public use, and that the return allowed in said order is a fair return upon the fair value of said property.

XXIV

Defendants allege that an unusual condition exists in the city of Washburn. Subsequent to the War period the city has declined, and is now in a decadent condition. The city of Washburn has suffered one of the most disastrous reverses in the history of Wisconsin cities. Real estate values have been reduced to a fraction of their former value, the market for property generally is almost dead, and tax delinquencies are relativly enormous. Every piece of real property in Washburn has suffered a great decline in value. In view of the financial condition of the city, the value of the property of the Washburn Water Works Company cannot be determined independent of conditions which fix

the value of other property in the city. While public utility properties must be valued to some extent on principles other than those which control commercial values, public utility property cannot escape a part of the loss involved in such a decline as has taken place in Washburn. There is a point on the scale at which decline of population, industry and wealth will affect the value of the utilities situated in that city. This point, so far as plaintiffs' property is concerned, has been reached in the city of Washburn. The property does not have a commercial value in any way approximating its present day cost of reproduction, such cost less depreciation, or the original investment cost. Economic changes have thus adversely affected the value of plaintiffs' property.

[fol. 87] XXV

Defendants deny each and every allegation set forth in said bill of complaint herein except in so far as the same has been herein specifically admitted.

Wherefore defendants pray that notwithstanding they have answered all the facts and allegations of the bill of complaint, that the court dismiss the bill of complaint for lack of jurisdiction over the parties defendant, and defendants further pray that this Honorable Court dissolve the temporary restraining order heretofore issued, and dismiss the bill of complaint with costs, and that the defendants have such other and further order and judgment as to the court may seem just and equitable.

Railroad Commission of Wisconsin. Lewis E. Gettle, Adolph Kanneberg, A. R. McDonald. John W. Reynolds, as Attorney General for the State of Wisconsin. John W. Reynolds, Attorney General; Suel O. Arnold, Assistant Attorney General, Solicitors for Defendants.

Due and personal service of the within answer admitted this 1st day of February, 1929.

Olin & Butler, Attorneys for Plaintiffs.

[fols. 88 & 89] Here appears Bond in connection with Extension of Restraining Order and approved by the District Judge.

[fol. 90] Here appears Notice of Motion to strike out paragraph 24 of the Answer.

[fol. 91] In United States District Court

Motion to Strike Out Paragraph 24 of Answer—Filed April 5, 1929

Upon the record herein and the law and decisions of the State of Wisconsin and of the Federal courts, the plaintiffs herein move to strike paragraph 24 of the answer of the defendants herein on the ground and for the reason that the same is irrelevant and immaterial to the controversy at issue herein, and that the allegations and conclusions therein contained have no bearing or relations to the issues in this case.

Dated March 29, 1929.

H. L. Butler, R. M. Reiser, Solicitors for the Plaintiffs.

[fol. 92] In United States District Court

Decree—Filed April 5, 1929.

This cause having come on to be heard before a statutory court consisting of three judges, and the plaintiffs and defendants having submitted their evidence in support of their contentions, and the court having heard and considered such evidence and the argument of counsel, and it appearing therefrom that the valuation fixed by the defendant Railroad Commission of Wisconsin in its order dated the 4th day of December, 1928, assigning a value of $75,000 to the property of the plaintiffs for rate-making purposes was not and is not supported on the record before the Commission and on the record herein,

Now, therefore, it is accordingly ordered, adjudged and decreed as follows:

That the defendants, Lewis E. Gettle, Adolph Kanneberg and A. R. McDonald, constituting the Railroad Commission of Wisconsin, and said Railroad Commission, and John W.

Reynolds, Attorney General for the State of Wisconsin, and each of them, be and they are hereby perpetually enjoined from taking any steps to enforce the order of the Railroad Commission dated December 4, 1928, a copy of which is attached to the complaint of the plaintiff as Ex-
[fol. 93] hibit C in these proceedings, and said defendants and each of them are hereby enjoined from taking any steps whatsoever to require the plaintiffs to charge the rates prescribed by said order, or to carry out any of the directions contained in said order; and said defendants are likewise enjoined from interfering with the plaintiffs in charging adequate and reasonable rate yielding a fair and adequate return on the value of the property of the plaintiffs used and useful in connection with the plaintiffs' business as a public water works utility at Washburn, Wisconsin.

Dated this 5th day of April, 1929.

George T. Page, F. A. Geiger, District Judge-; C. Z. Luse, District Judge, Judges Presiding at This Case.

[fol. 94] IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL—Filed June 27, 1929

The defendants above named by John W. Reynolds, Attorney General of the State of Wisconsin, and S. O. Arnold, Assistant Attorney General of the State of Wisconsin, feeling themselves aggrieved by the order and decree of the above named court against them, made and entered on the 5th day of April, A. D. 1929, granting plaintiffs' application for a perpetual injunction restraining the defendants, and each of them, from taking any steps to enforce the order of the Railroad Commission, dated December 4th, 1928, and enjoining said defendants, and each of them from taking any steps whatsoever to require the plaintiffs to charge the rates prescribed by said order, or to carry out any of the directions contained in said order, and enjoining said defendants, and each of them from interfering with the plaintiffs in charging adequate and reasonable rates yielding a fair and adequate return on the value

of the property of the plaintiffs used and useful in connection with the plaintiffs' business as a public water [fol. 95] works utility at Washburn, Wisconsin, do hereby appeal from said order and decree to the Supreme Court of the United States for the reasons specified in the assignment of errors, which is filed herewith, and pray that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said order and decree was made, duly authenticated, be sent to the Supreme Court of the United States under the rules of such court in such case made and provided.

Dated this 27 day of June, A. D. 1929.

John W. Reynolds, Attorney General of the State of Wisconsin; Suel O. Arnold, Assistant Attorney General of the State of Wisconsin, Attorneys for Defendants.

The foregoing appeal is allowed.

Dated June 27, 1929.

—— ——, Circuit Judge. F. A. Geiger, District Judge. C. Z. Luse, District Judge.

[fol. 96] [File endorsement omitted]

In United States District Court

In Equity

W. G. Maxcy, as Receiver of the Washburn Water Works Company, a Wisconsin Corporation, and Washburn Water Works Company, a Wisconsin Corporation, Plaintiffs,

v.

Railroad Commission of Wisconsin, Lewis E. Gettle, Adolph Kanneberg, and A. R. McDonald, as Members Thereof, and John W. Reynolds, as Attorney General for the State of Wisconsin, Defendants

Assignment of Errors—Filed June 27, 1929

Defendants in connection with petition for appeal herein present and file therewith their assignment of errors, as to

which matters and things they say that the order and decree entered herein on the 5th day of April, 1929, is erroneous, to-wit:

First. That the court erred in decreeing that the defendants, and each of them, be perpetually enjoined from taking any steps to enforce the order of the railroad commission, dated December 4, 1928, a copy of which is attached to the plaintiffs' bill of complaint as Exhibit C in this proceeding, and enjoining the said defendants and each of them from taking any steps whatsoever to require the plaintiffs to change the rates prescribed in the said order, or to carry out any directions contained in said order, and enjoining the defendants and each of them from interfering with the plaintiffs in charging and collecting the rates set forth in the schedule of rates marked Exhibit D, [fol. 97] attached to the plaintiffs' bill of complaint.

Second. That the court erred in holding that the valuation fixed by the defendant railroad commission of Wisconsin in its order dated the 4th day of December, 1928 assigning a value of $75,000.00 to the property of the plaintiffs for rate making purposes was not and is not supported on the record before the commission and on the record herein.

Third. That the court erred in failing to hold that the rates fixed by the said order of the defendant railroad commission dated December 4, 1928 were and are adequate and reasonable and yield a fair and adequate return on the value of the plaintiffs' property used and useful in connection with the plaintiffs' business as a public water utility at Washburn, Wisconsin.

Wherefore defendants pray that the order and decree may be reversed and that defendants may have an adjudication and decree in their favor.

John W. Reynolds, Attorney General of the State of Wisconsin; Suel O. Arnold, Assistant Attorney General of the State of Wisconsin, Attorneys for Defendants.

Presented and filed this 27 day of June, 1929.

C. Z. Luse, District Judge.

[fol. 98] In United States District Court

Order Allowing Appeal—Filed June 27, 1929

The defendants in the above entitled action having filed their petition for an appeal herein and therewith their assignment of errors,

Now, on motion of John W. Reynolds, Attorney General of the State of Wisconsin, and S. O. Arnold, Assistant Attorney General of the State of Wisconsin, attorneys for defendants,

It is ordered that the appeal of the said defendants from the order and decree allowing a perpetual injunction heretofore filed and entered herein on the 5th day of April, 1929, be and the same is hereby allowed as prayed for, the amount of the appeal bond being hereby fixed at the sum of Two Hundred Fifty ($250.00) Dollars, with surety to be approved by the court or the judge thereof.

Dated this 27 day of June, 1929.

—— ——, Circuit Judge. F. A. Geiger, District Judge. C. Z. Luse, District Judge.

[fols. 99 & 100] Here appears Bond on Appeal duly approved by District Judge.

[fol. 101] In United States District Court

Certificate of Evidence and Exceptions—Filed June —, 1929

The said Railroad Commission of Wisconsin, Lewis E. Gettle, Adolph Kanneberg and A. R. McDonald, as members thereof, and John W. Reynolds, as Attorney General for the State of Wisconsin, having prayed and been allowed an appeal from the judgment, order and decree entered herein on the 5th day of April, 1929, and each and every part thereof, to the Supreme Court of the United States, the court, for the purpose of completing the record in the above entitled cause, respecting the proceedings had in said cause, and to enable the said Railroad Commission

of Wisconsin, Lewis E. Gettle, Adolph Kanneberg and A. R. McDonald, as members thereof, and John W. Reynolds, as Attorney General for the State of Wisconsin, to have said proceedings, and the judgment, order and decree entered therein reviewed upon said appeal, do hereby certify that the following proceedings were had in said cause at the respective times hereinafter stated:

That on January 2, 1929, the said W. G. Maxcy, as Receiver of the Washburn Water Works Company, and the Washburn Water Works Company, filed in this court their bill of complaint in equity, praying that the Railroad Com- [fol. 102] mission of Wisconsin, Lewis E. Gettle, Adolph Kanneberg and A. R. McDonald, as members thereof, and John W. Reynolds, as Attorney for the State of Wisconsin, be enjoined and restrained from enforcing or attempting to enforce against the plaintiffs an order of the Railroad Commission of Wisconsin, dated December 4, 1928, and from interfering, or attempting to interfere with the plaintiffs in charging, collecting and enforcing the rates set out in schedule form and attached to the said bill of complaint, and from instituting, authorizing or directing the institution of any action or actions against the plaintiffs, their agents or employes, for the recovery or enforcement of any penalty under and by virtue of the statutes of the state of Wisconsin, by reason of the charging, collecting and enforcing by the plaintiffs of the rates provided in said schedule attached to the said bill of complaint.

That on the 2d day of January, 1929, this court made and filed a temporary restraining order against the said defendants as prayed for in said bill of complaint.

That thereafter, and on the 22d day of March, 1929, a hearing was had before the Honorable G. T. Page, Circuit Judge, and the Honorable F. A. Geiger and the Honorable C. Z. Luse, District Judges, R. M. Reiser, appearing as solicitor for the plaintiffs, and Suel O. Arnold, Assistant Attorney General for the State of Wisconsin, appearing as solicitor on behalf of the defendants. The court then and there suggested, and counsel for the respective parties in open court stipulated that the issues in this case be tried on affidavits and such parts of the record before the Railroad Commission as counsel deemed pertinent. At said time said matter was adjourned to April 5, 1929.

That thereafter, and on the 5th day of April, 1929, at a stated term of this court begun and held in Madison, Wisconsin, the issues joined in the above cause, between the parties, came on to be heard before this court, the plaintiffs being represented by R. M. Rieser of Madison, Wisconsin, their solicitor, and the defendants by Suel O. Arnold, Assistant Attorney General of the State of Wisconsin, their solicitor.

That before any evidence in said case was offered, the [fol. 103] plaintiffs moved to strike out paragraph 24 of the defendants' answer, on the ground that said paragraph raises issues immaterial and irrelevant to the issues presented in the plaintiffs' bill of complaint. The said motion of the plaintiffs was denied, and the plaintiffs then and there duly excepted to the ruling of the court.

Upon the hearing of the issues in said cause, the attorneys for the plaintiffs, in order to establish, maintain and prove the allegations of their said bill, offered the affidavit of W. G. Maxcy, marked Exhibit "1" as follows:

EXHIBIT 1

Title and venue omitted

"W. G. Maxcy, being first duly sworn on oath, deposes and says that he is the Receiver named as one of the plaintiffs in the above entitled action; that he makes this affidavit supplementing the affidavit attached to the complaint in the above entitled action (see Page — hereof); affiant further says that his experience in the water utility business is fully set forth in the affidavit above referred to.

The Washburn Water Works Company was incorporated in 1889 with the following capital structure: One Hundred Thousand Dollars ($100,000.00) of common stock; that thereafter there were issued Seventy-five Thousand Dollars ($75,000.00) of first mortgage bonds which are still outstanding, and an additional issue of Twenty-five Thousand Dollars ($25,000.00) of second mortgage bonds which are also outstanding; in addition to these items said company has outstanding liabilities not funded amounting to $57,698.01, said item being the accumulated deficits due to inadequate rates and also money advanced to make extensions and additions to the plant of said company.

Referring to Paragraph Eight of the complaint herein (Page — hereof), affiant says that since December 31, 1920 there have been made additions and extensions to said plant aggregating the sum of $6,623.85, whereby the figure of $74,253.00 representing cost of reporducing property prior to 1916 has been increased by expenditures for such extensions and improvements to said sum of $87,415.85.

Affiant further says that upon the filing of the rate schedule attached to the complaint as Exhibit B (Page — hereof) this affiant in billing water consumers and customers of said company attached to each bill a reservation reserving the right to insist upon the collection of and to collect the higher rates represented by said rate schedule if and when it should be determined that said company shall be entitled to such increase; such practice continued down to the date of the commencement of this action.

[fol. 104] "Affiant further says that said Washburn Water Works company due to the fact that it has had inadequate rates has found it impossible to meter all the water customers of said company, but whenever customers demanded meters such meters were installed, and said practice has continued down to the present time with the result that since January first, 1928, there has been invested by the Receiver for such purposes substantially $1,000.

Affiant further says that based upon his experience in the water utility company and his familiarity with the conditions at Washburn and with water utilities not having a limited supply of water, it is not economical to meter customers, for the reason that the additional investment in meters, the depreciation thereof, the cost of maintenance thereof, the additional return required upon the investment, the expense of placing and replacing meters, and the expense of reading meters and billing customers exceeds the additional cost of pumping water that is wasted or is used in excess of water that is used by meter customers, and this utility having an unlimited supply of water, with large storage capacity has followed the practice of serving its customers on a flat rate basis which has resulted, in the judgment of this affiant in lower operating costs taking into consideration the items above referred to, than would have resulted had all the customers been metered.

Affiant further says that he has checked over and examined the Commission's order of December 4, 1928, and the deductions made by the Commission from the actual operating expenses of said Company; as appears from Exhibit B of the complaint, (Page — of the record herein), the operating expenses for the years 1922 to 1926 both inclusive, were far in excess of the operating expenses estimated by the defendant Commission as being proper; and in the judgment of this affiant such operating expenses during said period could not have been decreased; for the year 1927 the operating expense for production, distribution, commercial, general and tax items aggregated $15,055.52, and the corresponding items for 1928 were $14,913.19; that in addition to such expenses for said period of time, there was properly deductible the annual accumulated depreciation of $1,141.81, making a total operating expense of $16,054.90 for the year 1928; in addition to the actual disbursements and expenditures under receivership of said sum of $16,054.90 for the year 1928, there is now and has been accumulated for legal and Railroad Commission expenditures and still remaining unpaid, not less than $5,000, such items including a balance still due the E. M. Smart Estate of $2,290.24, and the balance being due to Olin & Butler, attorneys for the Receiver in these proceedings, and L. W. Hull, as attorney for the Receiver in the receivership proceedings in Federal Court, which items should be amortized over a period of five years so that to the actual operating expense there should be added an [fol. 105] additional $1,000 per year in order to amortize the existing indebtedness, which item if added to the item of $16,054.90, would make the minimum proper operating expense of said company $17,054.90 for the year 1928, and $17,197.33 for the year 1927. Taking in consideration present conditions with respect to cost of labor, material, etc., affecting the expense for the future, this affiant is of the opinion that the expense in the future will be not less than the items above set forth but on the other hand will probably be increased by reason of the installation of additional meters from time to time and similar items.

As further evidencing and confirming the statements herein made as to accumulated legal fees, affiant attaches hereto a copy of a letter to Messrs. Fawsett & Shea, suc-

cessors to Fawsett, Smart and Shea, and a letter in reply from said firm referring to the item of unpaid fees and expenses still owing to said firm, which copies have been marked respectively Exhibit- 1 and 2.

Affiant further says that with respect to the pumping costs criticized by said Railroad Commission that prior to the installation of the present pump, affiant made a careful investigation to determine the proper size of such installation and consulted with T. W. Gray, an experienced water works builder and operator with over thirty years experience, and also had information from the engineers of Allis-Chalmers Company, and as a result of such investigation and the advice received from such sources, this affiant made the installation of the type and size of pump now criticized by the Railroad Commission; that considering all of the demands of the City of Washburn, it is opinion of this affiant and was the opinion of such experts that a pump of the size now installed was necessary; moreover in making such installation, consideration was also given to the fact that in the event of a failure of the reservoir at any time, resort must be had to the pump for direct pressure in the event of an emergency such as a fire, and to meet such an emergency a pump of the size installed was and is absolutely necessary.

Said pump having been installed in reliance upon the opinion of such experts, affiant thereupon proceeded to enter into a contract with the Lake Superior District Power Company, which commits him to a minimum annual bill in excess of the estimate for electric energy referred to in the Commission's order of December 4, 1928; and said contract will not expire until May 1, 1931; said contract being made in the light of the particular installation of the particular pump criticized by the Railroad Commission.

Affiant further says that the items of operating expense have never been criticized by any representative of the Railroad Commission in any prior hearing and no criticisms have ever been made of the operating expenses of this company except that in a prior decision the Commission recommended the installation of electric pumping equipment, except for such recommendation there has never been in any proceeding before the Railroad Commission any evidence offered indicating or showing in what re-

[fol. 106] spects and as to what items the operating expenses could be or should be reduced.

Affiant further says that in addition to being interested in water works properties, affiant is interested in various industrial enterprises and has been connected with banking institutions, and has floated several note and bond issues during the past few years; in order to avail himself to the best advantage of financial conditions, affiant has studied the money market and has been and is familiar with the amount of return ordinarily necessary in order to interest capital in any venture; affiant further says that in order for capital to be interested in any institution or business the history of maintained net earnings is important and to the extent that net earnings are uninterrupted or denied, capital requires a larger return, and based upon such knowledge and the information and history of the earnings of the Washburn Water Works Company, it is the opinion of this affiant that not less than 8% net earnings are required in order to interest capital and keep it interested in such company; and this item of return is especially important to said Washburn Water Works Company at this time for the reason that immediately following the disposition of this case it will be necessary to refund the present outstanding indebtedness of said company. To the extent that a return of less than 8% is available to said company, it will be extremely difficult to interest capital in such venture.

Affiant further says that if a fair return is allowed to said company there will be additional income taxes both to the State of Wisconsin and to the Federal Government not included in the item of taxes paid heretofore aggregating $3,742.82 for the year 1928 which will be equal to over $862, which item if added to the item of $17,054.90 above referred to will make the total expense chargeable to said company substantially $18,000.

If to such items there is added an additional return of 8% upon the present value of said property found by Engineer Hartt of $122,952.00, an additional $9,836.16 of revenue must be provided, and to the extent that it is not provided, said company will be denied a return of 8%.

Affiant has had submitted to him an estimate and study of operating expenses for said plant prepared by J. S.

Hartt, which is attached hereto, marked Exhibit 3, and made a part hereof, which in the judgment of this affiant represents the actual minimum requirements of said company, in order to meet future operating expenses, pay taxes, provide an adequate depreciation reserve, and a return of 8% upon the present value of the property devoted to the public use, and the same is therefore adopted as the minimum requirements for said company.

W. G. Maxcy."

Jurat omitted.

[fol. 107] EXHIBIT 1

Copy

Oshkosh, Wisconsin, January 28, 1929.

Messrs. Fawsett & Shea, Milwaukee, Wis.

GENTLEMEN: Enclosed find note of the Washburn Water Works Company for $2,290.24 to clean up the bills incurred through Mr. Smart's services. I have dated this note January 2d, on one year's time, and will guarantee that it will be taken up on or before that time. If the settlement can be made with the city, then this note will be taken up right after the settlement. This will get the matter off your books and mine.

Kindly send letter acknowledging receipt of the note, that I may file with the bills.

Yours very truly, (Signed) W. G. Maxcy, Receiver of Washburn Water Works Co.

WGM P.
Encl.

EXHIBIT 2

Copy

Fawsett & Shea, First Wisconsin National Bank Building, Milwaukee

January 30, 1929.

Subject: Washburn Water Works Company.

Mr. W. G. Maxcy, Algoma Building, Oshkosh, Wisconsin.

DEAR SIR: This will acknowledge receipt of your letter of the 28th instant enclosing note for $2,290.24. We are glad

to have your assurance that the note will be paid on or before the due date.

Yours very truly, (Signed) Fawsett & Shea.

EBS.LHT.

[fol. 108] EXHIBIT 3

Washburn Water Works Company

Operating Expenses

	1927 expenses	1928 expenses	Estimated normal expenses
Pumping Labor	$513.05	$514.50	$515
Pumping Supplies and Expenses	218.36	149.50	150
Power Purchased	5,020.08	4,581.05	4,581
Purification Supplies and Expenses	57.62	16.17	25
Distribution Labor	907.70	1,070.50	1,000
Distribution Supplies and Expenses	50.30	83.33	75
Commercial Labor	978.00	992.00	992
Commercial Supplies and Expenses	104.18	123.75	123
General Office Salaries	750.00	750.00	750
Miscellaneous General Expenses	495.39	317.22	317
Maintenance, Grounds, and Station	122.39	45.56	50
Maintenance, Reservoir	177.30	74.00	75
Maintenance, Pumps	13.39	7.00	25
Receivership Bond	125.00	125.00	125
W. G. Maxcy salary and Office Expense	2,000.00	1,206.07	1,200
Legal, Engineering and R. R. Com. Expense	390.00	1,224.25	1,000
Total Before Depreciation and Taxes	$11,922.76	$11,279.90	$11,003
Depreciation, 1% on $136,611			1,366
Personal Property Tax, 5.15% of $116,952			6,023
Wisconsin Income Tax (Estimated) on additional income			90
Federal Income Tax, 12% on $6,436			772
Total Operating Expenses			$19,254
Return 8% on $122,952			9,836
Total All Expenses			29,090

[fol. 109] The plaintiffs then offered the affidavit of J. S. Hartt, marked Plaintiffs' Exhibit 2, as follows:

EXHIBIT 2

Title and Venue Omitted

"J. S. Hartt being first duly sworn, on oath says that he is an electrical engineer, being a graduate of Michigan

State College at Lansing, Michigan, with the class of 1915; that he is now practicing as a consulting engineer in the city of Madison, and has so practiced since 1920; prior to said time this affiant was engaged in construction and operation of public utility projects, principally in the State of Wisconsin since graduation, except for a period during the World War when this affiant was engaged by the United States Government in the Quartermasters' Department in the construction of cantonments, warehouses and piers, and that such work required the checking and inspection of all materials entering into the projects, upon which this affiant worked.

That since 1920 in his capacity as a consulting engineer this affiant has made valuations of public utilities as well as other property, such public utilities consisting of street railways, electric light plants gas plants ice plants water work plants and steam railroads both within the State of Wisconsin and outside the State of Wisconsin both for municipalities and for private corporations and public service corporations owning such plants; that such valuations have been in excess of one hundred million dollars that as part of the valuation work and incident to the full and complete presentation of this affiant's estimate of the value of such properties and the condition thereof this affiant has from time to time co-operated with the staffs of the various commissions and other public bodies having jurisdiction over such utilities and has frequently checked the unit prices to be substantially in accord with the prices of this affiant and such commissions, including the Railroad Commission of Wisconsin, having frequently adopted in substance the valuation of this affiant as well as his judgment of the condition of the property so valued.

Affiant further says that at the request of the plaintiffs herein, this affiant made a valuation of the property of the Washburn Water Works of Washburn, Wisconsin, and the same is being submitted herewith, and reference is made thereto the same as if incorporated herein, a summary of such valuation, being page one thereof, being the only page attached hereto, but the detail thereof being filed with the Clerk of this Court for further reference by the Court; that such valuation is made by taking an inventory, which in all material respects is substantially identical with that used by the Railroad Commission of Wisconsin in arriving at

the valuation and rate base assumed in the case now at issue; to the elements of such inventory this affiant has applied the unit prices reflecting the present cost of reproducing such property as of February 1, 1929, and from the total so obtained, as shown upon page 1 of such valuation, there were deducted percentages representing the depreciation of the property, whereby this affiant then arrived at the depreciated value of the property reflected and shown [fol. 110] in the right hand column of said page 1; that the cost of reproduction new of said property on the basis of prices for labor and material was $138,537.00, and the depreciated value thereof $117,952.00 both items including the actual material and supplies on hand and the estimate of working capital required.

That said valuation of the depreciated property as of February 1, 1929, of $117,952, includes all the physical elements of the plant ready for operation, with working capital supplied to permit it to operate, but without any estimate of the value of said plaint as a going concern.

That said plant being now in operation and having attached thereto customers, has an additional value, in the judgment of this affiant, in excess of the value of the physical elements of such plant, which is in excess of $5,000.00.

Affiant further says that in arriving at the depreciated value of said property, affiant took into consideration his knowledge of the general effect of Lake Superior water upon water mains and particularly the universally accepted information that such water does not scale the pipes, such information being confirmed by inspection of mains at Superior and Ashland, Wisconsin, that have been in use over thirty years without showing any visible sign of deterioration on the inside of the pipe, and but slight signs of soil damage on the outside; supplementing this information affiant also based his determination upon inspection of various elements of such plant and inspection of some mains that have been cut.

Affiant further states that the depreciation arrived at by the Railroad Commission of Wisconsin in 1922 and 1923, indicate that it was arrived at by using the four per cent sinking fund method of depreciation and that in 1928, the depreciation found by the Railroad Commission indicated that it was based on straight line depreciation.

From personal knowledge of this affiant with the practice of utility companies generally, this affiant is of the opinion that the four per cent sinking fund method is a proper method of reflecting the actual results of depreciation of property for the reason that the fund established for such purposes is in practice invariably invested in the property of such company or in securities netting the company a sum equal to or in excess of four per cent and therefore by the use of such four per cent sinking fund method the result obtained reflects the actual practice in the business and the accepted method of supplying the depreciation fund, while the straight line method presupposes that no investment of such fund is made, which is contrary to the practice.

[fol. 111] Affiant further says that incident to his capacity as consulting engineer, he has from time to time purchased and negotiated contracts for purchase of water utilities and other properties for clients and that the guiding standard used by him in judging the value of such properties and accepted by such purchasers has always been the cost of reproducing such properties, less depreciation, with a fair allowance for going value. Properties of this kind are being brought frequently during the past years at prices equal to the cost of reproduction less depreciation, plus an allowance for going value.

At the request of the plaintiffs, an analysis has been made of the valuation as of January 1, 1928, made by F. C. Thiesen, an employee of the Railroad Commission, the same being referred to in the order of said Commission (Exhibit C of the complaint); in the time intervening between January 1, 1928, and Dec. 4, 1928, the unit prices of mains, forming the bulk of the physical property of the water company, recovered materially from a temporary slump and recovered slightly more from such slump by February 1, 1929, so that as of the latter date, such unit prices were substantially the same as in 1922 and but little below the average for the period 1922-1929.

Some other elements of said plant showed a similar increase during the same period, and these items of increase were also determined. Thereupon this increase was expressed in terms of percentages and applied to the respective items of property, whereby the valuation of said Thiesen as of January 1, 1928, was brought down to and made comparable with the valuation of this affiant, sub-

mitted as of February 1, 1929. The result of these comparisons sows that as against a valuation of $114,089, arrived at by said Thiesen as of January 1, 1928, he would have arrived at a valuation of $122,000 as of February 1, 1929, had he reflected the increase in the cost of reproducing the property.

Likewise he would have arrived at substantially the same figure on December 4, 1928.

As against this figure of $122,000, thus obtained, this affiant obtained a valuation of $136,611 for reproducing the same items of property as of the same date, so that the Thiesen valuation is about 10% less than that of affiant. Offsetting this difference, however, there are about $1,000 of additions made after the Thiesen valuation, which reduces the difference to an even lower percentage.

A comparison has also been made of the difference between the depreciated value assigned to this property by said Thiesen and by this affiant. This has been done by applying the same rate of depreciation to the $122,000 valuation that was used by said Thiesen in depreciating the $114,089 valuation, as of January 1, 1928. This comparison shows a difference between this affiant and said Thiesen of $25,000, or substantially 22%. Thus though a relatively small difference exists between affiant and said Thiesen as to the cost of reproducing this property, this difference is more than doubled after Thiesen depreciated the property.

[fol. 112] To further illustrate this difference, affiant has prepared a schedule showing the depreciation assigned to the various items of property by said Thiesen in 1922 and in 1928, and also the percentages assigned by this affiant to the same items of property, which has been attached hereto, marked Exhibit A and made a part hereof.

Referring to page 4 of the decision of the Railroad Commission, under date of December 4, 1928, page — of the record herewith, the Commission has tabulated the pumpage at Washburn for the years 1923-27, both inclusive, which tabulation shows a pumpage substantially the same for the years 1923-25, and a drop in gallons pumped of substantially 38,000,000 gallons for 1926, and the further drop in 1927 of an additional 29,000,000 gallons, from which the Commission concludes that "the decrease in pumpage noted above is due largely to the installation of meters.

The steam pumps, referred to above, were depreciated 75 per cent by this affiant in making his valuation (see valuation detail, page 13) largely because of evidence of excessive slippage developed by such pumps. The pumpage computed by the company is not measured by accurate meters, but is measured by counting the strokes of the steam pump and by determining the length of time the electric pump operates. The pumpage computed during the time the steam pump was in operation was considerably in error, due to the excessive slippage, while the electric pump is new and computing pumpage from hours and minutes of operation gives a more accurate estimate of the amount of water pumped. This, in my judgment, accounts for the greater part of the difference in the pumpage in 1926 and 1927. The fact that 1926 had seven months of steam pumpage and five months of electric pumpage emphasizes this conclusion when compared with the figures of 1927.

J. S. Hartt.

Jurat omitted.

Comparison of Depreciation

	Per Cent Condition		
	F. C. Thiesen, 1922	F. C. Thiesen, 1-1-1928	J. S. Hartt, 2-1-1929
Cast iron mains	93	84	94
Galvanized steel mains	40	20	30
Valves	90	80	85
Hydrants	90	83	90
Meters	99	90	92
Intake	93	79	85
Pumping station	93	78	82
Stack and Breeching		10	50
Reservoir	95	95	95
Pumps, Heaters and Engine	22	13	25
Boilers and Piping	18	10	25
Electric Pump	..	..	95

[fol. 113] The plaintiffs then ordered the affidavit of Quentin Meeuwsen, marked Plaintiffs' Exhibit 3, as follows:

EXHIBIT 3

"Quentin Meeuwsen being first duly sworn, on oath says that he is an assistant engineer in the office of J. S. Hartt, consulting engineer of Madison, Wisconsin, and is a graduate of the engineering department of the University of Wisconsin, and has had 3 years engineering experience. During the past 2 years he has been employed in various kinds of valuation work and rate work and part of his duties have required him from time to time to check rates and proposed rates to determine the amount of revenue that such rates will or do produce, and also to set up rates and analyze the operating history of companies so as to foretell insofar as it can possibly be done the probable revenue to be derived from various kinds of rates and rate schedules.

That in said capacity and under the direction of J. S. Hartt, this affiant made an analysis of the rate structure and the consumption records, records of receipts, etc. in the possession of the receiver in this case to determine the probable revenue that would be received from the use of the temporary rates now in effect and shown at Exhibit D, but not printed. As a result of such study this affiant found that based upon the classification of customers now in effect, under such rate schedule the plaintiffs will receive from the rates in effect, under the temporary restraining order $27,281 as against the estimate of W. G. Maxcy of $27,958, divided $14,222 from general service and $13,059 from fire protection service.

On this basis these rates will provide a return of less than seven per cent upon the $122,000 valuation submitted by Mr. Hartt herein, and approximately seven per cent on the $110,000 upon which the temporary rates in this case were put into effect.

Quentin Meeuwsen.

Jurat omitted."

The plaintiffs then offered the valuation made by J. S. Hartt, marked Plaintiffs' Exhibit 4:

[fol. 114] EXHIBIT 4

Valuation of Washburn Water Power Company

Jay Samuel Hartt, Consulting Engineer

Date of Inventory: February 1, 1929

Recapitulation of Valuation

	Water utility	Reproduction cost new	% cond.	Depreciated value
311	Land	275	.....	275
312	Structures and Water Supply facilities	24,439	.....	21,125
313	Boiler Plant Equipment	6,235	.....	1,484
314	Steam Power Pumping Equipment	1,567	.....	392
315	Electric Power Pumping Equipment	3,719	.....	3,533
319	Mains	71,086	.....	64,144
321	Consumers' Meters	3,293	.....	3,030
322	Hydrants	7,050	.....	6,345
324	Office Equipment	68	.....	34
326	Miscellaneous Equipment	1,060	.....	530
	Subtotal	118,792	.....	100,892
	Engineering, Supervision, Interest during Construction, Contingencies, etc., 15%	17,819	.....	15,134
	Subtotal	136,611	.....	116,026
	Material and Supplies	926	.....	926
	Working Capital	1,000	.....	1,000
	Grand Total	$138,537	.....	$117,952

Whereupon plaintiffs rested their case in chief.

[fol. 115] Whereupon the defendants, to maintain the issues on their part, introduced a portion of the record before the Railroad Commission of Wisconsin, being a final summary of the valuation made by the Commission's staff, on January 1, 1928, marked Exhibit "B," as follows:

EXHIBIT B

	Reproduction cost	Reproduction cost less depreciation
A. Land	275.00	275.00
B. Transmission & Distribution	73,837.00	59,244.00
C. Buildings & Miscellaneous Structures	15,566.00	12,385.00
D. Plant Equipment	9,030.00	3,599.00
E. General Equipment	500.00	250.00
F. Paving	.....	.....
Total	99,208.00	75,753.00
Add 15% (see note below)	14,881.00	11,363.00
Total	114,089.00	87,116.00
H. Materials and Supplies (not included).		

NOTE.—Addition of 15% to cover engineering, superintendence, organization and legal interest, taxes, contingencies, etc. for the period of construction.

[fol. 116] The defendants then offered the transcript of proceedings before the railroad commission on October 3, 1923, at Washburn, Wisconsin, marked Exhibit "I," at which time H. H. PEAVY, a witness duly sworn on behalf of the city of Washburn, testified as follows:

EXHIBIT I

Direct examination:

I have been a mayor of this city for two full terms and part of a third term. I have been engaged principally in the real estate and publishing business. I have lived in the city of Washburn since the spring of 1910. When I first came here the number of industries of the city were equally divided between lumbering and the operation of the DuPont Powder plant, which is located in the town of Barksdale, four miles southwest of the city of Washburn. Practically all of the employes of the powder plant lived in the city of Washburn. Up to the beginning of the World War in 1918, the DuPont Company employed about two hundred men. In 1918 the Company employed between two and three thousand men. After the armistice in 1919, the number of employes was reduced to three hundred. At the present time between two hundred and two hundred and twenty-five men are employed.

In 1910 the condition of the town was very much the same as it is today. In 1914 war orders from European countries began to come in and the DuPont Company started increasing its force. As the number of employes increased, property in the city of Washburn rapidly increased in value. In some cases the property increased in value a thousand per cent and in other instances two hundred fifty to three hundred per cent. In 1920 prices began to drop. In the fall of 1920 and 1921 the city of Washburn was visited with numerous disastrous fires. In 1921 and 1922 there were numerous mortgages foreclosures, which, together with the high taxes occasioned by the war, reduced property values to practically nothing.

[fol. 117] At the present time there are no saw mills in

Washburn. There is one box factory which employs between 70 and 80 people.

During the war the DuPont Company built twenty or twenty-five good houses in the city of Washburn for its managerial force. These houses still remain. During the same period the Company also built one hundred houses for its employes. In 1920 these houses were sold to Marshall Wells & Company were taken down in sections and moved away. During the past twelve months I do not know of a single bona fide sale of property in the city. There have been a few sales for cash consideration, but the property was sacrificed because the owner had to obtain money. The same condition has obtained since 1920.

During the past two or three years I have attended several foreclosure sales. No one has bid at such sales except the mortgagee. Very often the property has been bid in for less than fifty per cent of the amount of the judgment.

In my judgment the value of the property has declined to a greater extent than that shown by the assessment roll. It requires the full maximum rate required by law, on the basis of the assessment to produce income sufficient to maintain the city. For that reason, a great majority of the taxpayers have accepted the basis of assessment as being fair, but not because the assessed value represents true value. In my opinion, there is not five per cent of the property in Washburn today that can be sold for cash on the basis of the amount that it is assessed for.

Cross-examination:

The condition at the present time is practically the same as it was before the war, probably a little worse now. When the city boomed, property went up in value. Had the city desired to purchase the water plant during the boom period, it would have considered that the water plant had an increased value.

[fol. 118] The defendants then introduced the affidavit of Guy T. Ellis, together with an attached tabulation, marked Exhibit "J" as follows:

Exhibit J

Title and venue omitted

Guy T. Ellis, being first duly sworn on oath says that he is an accountant employed by the Railroad Commission of Wisconsin; that on the 27th, 28th and 29th days of March, 1929, he made an audit of the books of the Washburn Water Works Company, W. G. Maxcy, Receiver, particularly with reference to operating expenses of said Company, as shown by the books for the year 1928; that said books are kept on a receipt and disbursement basis; that the audit conducted by the said affiant was made to reflect the proper operating expenses for the year 1928 on an accrual basis; that the result of said audit has been incorporated in the various sheets hereto attached; that the figures contained in said sheet accurately reflect the operating expenses as shown by the books of said company and said receiver.

Guy T. Ellis.

Jurat omitted.

[fol. 119]

W. G. Maxcy, Receiver of Washburn Water Works Company

Statement of Operating Expenses per Books and After Audit Adjustments Year Ended December 31, 1928

		Adjustments			
		No. 1	No. 2	No. 3 and 4	
	Per books	1927 expenses included in 1928	1928 expenses not included in books in 1928	To correct for erroneous distribution of charges	As adjusted
Electric Power Pumping:					
Pumping Superintendence and Labor	$514.50	$52.85*	$52.50	.....	$514.15
Pumping Supplies and Expenses	253.36	19.55*	38.88	$83.05*	188.74
Power Purchased	4,581.05	457.59*	389.61	.....	4,513.07
Purification Expenses:					
Purification Supplies and Expenses	16.17	.....	19.00	.....	35.17
Distribution Expenses:					
Distribution Superintendence and Labor	1,070.50	94.50*	126.00	.....	1,102.00
Distribution Supplies and Expensse	156.93	3.50*	20.25	20.81	194.49
Commercial Expenses:					
Commercial Labor	992.00	62.50*	80.00	.....	1,009.50
Commercial Supplies and Expenses	123.80	11.45*	6.86	16.80	136.01
General and Miscellaneous Expenses:					
General Office Salaries	750.00	62.50*	62.50	.....	750.00
General Office Supplies and Expenses	96.82	8.00*	8.91	.....	97.73
Miscellaneous General Expenses	2,615.24	806.20*	793.40	.....	2,602.44
Total Expenses before Taxes and Depreciation	$11,170.37	.....	.....	.....	11,143.30
Taxes	3,742.82	3,742.82*	3,720.00	.....	3,720.00
Depreciation	1,141.81	.....	.....	.....	1,141.81
Total Expenses	$16,055.00	5,321.46*	5,317.91	46.34*	16,005.11

(*Credits.)

[fol. 120] The defendant then offered the affidavit of C. F. Morris, together with attached map and photographs, marked Exhibit "K" as follows:

EXHIBIT K

Title and venue omitted

"C. F. Morris, being first duly sworn on oath says that the attached blue print is a correct plat of the city of Washburn; that the red circles indicated on said plat correctly show the location of certain hydrants of the Washburn Water Works Company; that the photographs hereto attached were taken at the direction and under the immediate supervision of said affiant; that the numbers appearing on said photographs correspond with the numbers placed near the red circles on the plat; that said photographs correctly show the conditions at the hydrants in question at the [fol. 121] time said photographs were taken, to-wit, during the month of February, 1928.

C. F. Morris."

Jurat omitted.

The plaintiffs duly objected to the introduction in evidence of said Exhibit "K" on the ground that it was irrelevant and improper, and that the testimony offered had no relation to the standard of valuation. The said objection was overruled by the court, to which ruling of the court the defendants then and there duly excepted.

The defendants then introduced the affidavit of Frank C. Thiesen, together with attached memoranda, marked Exhibit "L" as follows:

EXHIBIT "L"

Title and venue omitted

"Frank C. Thiesen, being first duly sworn on oath says that he is an engineer employed by the railroad commission; that at the direction of the railroad commission he has made a valuation of the property of the Washburn

Water Works Company as of date January 1, 1929; that attached hereto is a final summary showing the result of said valuation; that there is also attached hereto supporting data in connection with some of the items of said valuation particularly the item of value of cast iron pipe, the item of value of labor, and the item of depreciation; that the statements contained in said final summary and said supporting statements are correct and true as this affiant verily believes.

Frank C. Thiesen."

Jurat omitted.

[fol. 122] Memorandum (Omitting Formal Parts)

In accordance with a request from the attorney general's office, we have prepared the valuation of the Washburn Water Works as of January 1, 1929, using present prices as of the same date.

Upon this basis of pricing we find the estimated cost new, to be $121,617.00, and a reproduction cost new, less depreciation of $93,364.00. The allowance for Materials and Supplies and Working Capital are set forth on the final summary sheet (sheet 1) as $800.00 and $1,700.00 respectively.

In this valuation, the value of the land is set forth as present value. The other items of physical property are priced upon a basis of wholesale reproduction, assuming the property to be constructed anew, using as near as can be the same kind and quality of material obtainable in the present market.

The various items of the inventory readily subject to investigation have been seen and a per cent condition placed, taking into consideration the age, service given, the estimated remaining useful service life, and the present physical condition. A large portion of the property lies underground. Samples of cast iron pipe were taken at two places in the distribution system, at the time of repairing two hydrants. These samples indicate a rather heavy incrustation and roughness of the interior. The condition per cent of the pipes has been fixed upon the basis of probable deterioration, and reduced carrying capacity, resting upon samples, tests, observation and general experience of pipes under conditions in the Lake Superior District as well as elsewhere in Wisconsin. The arbitrary method known as

the four per cent sinking fund method of determining the per cent condition has not been used. The per cent condition ascribed to each item of the inventory is intended to reflect the true present physical condition to the best of our knowledge and belief. The same basis of present per cent condition was employed in the valuation as of January 1, 1928.

[fol. 123] The valuation as of January 1, 1929, is based upon a labor rate of pay to common labor of thirty-nine (39) cents per hour. The valuation as of January 1, 1928, heretofore presented was based upon forty (40) cents per hour. The labor situation at Ashland, Washburn and Superior was reviewed. At the present time the Washburn Water Utility pays thirty-five (35) cents per hour, for repairing leaks, laying services, and installing meters. In accordance with interviews and a study of local conditions, a unit price of thirty-nine cents was adopted for use for the labor performance used in estimating costs of laying pipes. In the past year little property has been added. The difference between the totals at beginning and end of year 1928 is due largely to the fluctuation in the cost of iron pipe price. The prices used for 6″ cast iron pipe at the trench ready to lay are as follows:

January 1, 1928, valuation, $40.40 per ton.
January 1, 1929, valuation, $49.35 per ton.

The boiler plant equipment is at present in reserve, being used when the eastern reservoir on the hillside is being emptied and cleaned. The boilers have given long service, appearing to have had good care and operation. The allowable working pressure has been reduced in recent years. The boilers are kept ready for use in emergency. For safety and other factors, the boilers are nearing the end of a useful life. Gasoline engines are commonly used in Wisconsin as a replacement of standby steam equipment where conditions are proper for such introduction.

[fol. 124]

	Reproduction cost	Reproduction cost less depreciation
A. Land	$200	$200
B. Transmission and Distribution	80,458	64,769
C. Buildings and Miscellaneous Structures	15,566	12,385
D. Plant Equipment	9,030	3,582
E. General Equipment	500	250
F. Paving (none)	.....	.....
Total	105,754	$81,186
Add 15% (See note below)	15,863	12,178
Total	$121,617	$93,364
H. Materials and Suplies (allowance)	800	
Working Capital	1,700	

NOTE.—Addition of 15% to cover engineering, superintendence, organization and legal, interest, taxes, contingencies, etc., for the period of construction.

[fol. 125] The defendants then introduced in evidence a certified copy of the rate schedule filed with the Railroad Commission of Wisconsin by the Lake Superior District Power Company marked Exhibit N, as follows:

EXHIBIT N

Lake Superior District Power Company

Wholesale Power Rate (Washburn)

15,000-2,200 and 33,000 Volts Service for Installation of Over 50 Horse Power on Contract for a Period of Five Years or More

	50 h. p. to 2,200 V.	200 h. p. 15,000-33,000 V.	200 h. p. and above	
			2,200 V.	15,000-33,000 V.
Less then 10% load factor	5	4.25	3.75	3.5
Over 10% less than 15% L. F.	4	3.5	3.5	3.0
" 15% " " 20% "	3.5	3.0	3.0	2.3
" 20% " " 30% "	2.7	2.3	2.3	1.8
" 30% " " 40% "	2.3	2.0	1.8	1.6
" 40% " " 50% "	2.0	1.7	1.6	1.42
" 50% " " 60% "	1.7	1.5	1.42	1.32
" 60% " "	1.5	1.4	1.32	1.25
Minimum charge per horse power installed	75¢	75¢	75¢	75¢

Load Factor Based on 15-minute Demand and Actual Number of Hours in Month

20-200 h. p. schedule, maximum demand used not less than 50 h. p.

200 h. p. and over, maximum demand used not less than 200 h. p.

For coal docks or other hoisting load, or load with large short time peaks, not using motor generator sets, the demand will be based on three minute or on station capacity necessary.

Maximum demand is based on not less than 80% power factor. If power factor is less than 80% the power company has right to increase demand in proportion.

The above schedule of rates for power is based on the cost to the power company at Ashland, Wisconsin, of coal known as No. 1 West Virginia coal or equivalent, containing approximately 13,500 B. T. U. wet per pound or 13,800 B. T. U. dry per pound, costing not to exceed $4.00 per ton of 200 pounds f. o. b. cars at the power company's station siding at Ashland, Wisconsin.

In the event that the price for coal is greater than $4.00 per ton, then the above rate shall be advanced at the rate of .1 cent per kw. hr. for each dollar increase in price of coal over $4.00 per ton.

Lighting load connected not to exceed 10% of total connected load.

Under this rate no connections, service wires, or any necessary equipment will be furnished by the utility except in payment of cost and labor necessary to install.

Penalty

5% penalty if bills are not paid on or before the 10th of the month.

[fol. 126] The plaintiffs duly objected to the introduction of Exhibit "N," the objection was overruled and the plaintiffs thereupon duly excepted to the ruling of the court.

The defendants then offered in evidence Exhibit "O," which is an affidavit of F. C. Thiesen, an engineer of the

Railroad Commission, showing the names of the customers who were metered during the year of 1929, as follows:

EXHIBIT "O"

Title and venue omitted

"Frank C Thiesen, being being first duly sworn on oath says that the blue prints attached show the names of customers of the Washburn Water Works Company whose property was metered by said Company during the year 1929; said figures being taken from the meter record as kept by said company.

Frank C. Thiesen."

Jurat omitted.

[fol. 127] Mr. Jack Smith, Supt. Washburn Water Works Co.

Data from Meter Record Book

	Date, 1929	Name of depositor	Register number	Meter number	Deposit
1	1/10	C. A. Shoresman	129	3677692	10.75
2	1/10	Chas. Anderson	348	not given	7.25
3	1/11	Mrs. Gust Wedin	34	2168263	7.25
4	1/16	Ted Thorson	320	1290042	7.75
5	1/15	Clen Gibson	768	3314417	8.75
6	1/18	N. F. Fortier	069	3720277	6.00
7	1/24	Geo. McNeal	508	3720282	7.25
8	1/19	Henry Frachette	238	3720275	8.50
9	1/19	Mrs. Mary Renstrom	267	3720276	7.75
10	1/23	Albert Veno	192	3720278	9.25
11	1/24	John Siminen	598	3720280	9.25
12	1/23	Olaf M. Olson	269	3720281	8.75
13	2/ 2	Elmer Olson	193	3720288	9.25
14	1/24	John Frase	707	*3720283	*3.00
15	1/25	Norwegian Lutheran Parsonage	134	3720279	11.25
16	1/26	Tom Pratt	270	3720284	8.75
17	1/27	Frank Tetzner	22	3720293	13.00
18	1/27	A. I. Lien	744	3720292	10.75
19	1/27	Fred Marks	824	3720291	6.25
20	2/ 4	James Morris	396	3720294	7.25
21	2/ 4	Mrs. Anton Major	808	3720290	9.25
22	2/ 4	Miss Jessie M. Smith	231	3720287	9.75
23	2/ 6	Cy. J. McManus	769	3720286	8.25
24	2/ 7	Mrs. Ed. Gagne	315	3720285	9.25
25	2/ 7	Geo. Weetz	730	3720289	9.25
26	2/ 8	Mrs. Peter Kelly	331	3720395	4.75
27	2/ 8	M. E. Adams	13	3720396	8.75
28	2/ 8	John Carlson	357	3720399	6.75
29	2/ 8	Carl Ungrodt	492	3720398	9.25
30	2/11	Birt Birgman	741	3720400	8.25
31	2/11	Geo. Frechette	635	3720401	6.25
32	2/11	E. Burdick	597	not given	7.25
33	2/12	Omer Brisson	540	3720403	8.75

	Date, 1929	Name of depositor	Register number	Meter number	Deposit
34	2/12	Ike Berman	739	3720404	8.75
35	2/12	Jos. Vizanko	482	3720414	8.75
36	2/14	H. H. Horman	95	3720413	8.25
37	2/14	Washburn (Times) Ptg. Co.	6	3720412	7.00
38	2/15	Dr. Axley	194	3720411	10.25
39	2/15	F. E. Jacquot	748	3720410	10.75
40	2/15	M. C. Knake	671	not given	19.75
41	2/16	Carl Palm	797	3720406	6.25
42	2/16	Louis Thorson	485	3720405	9.75
43	2/16	Bayfield County Tool House	708	3720408	6.25
44	2/18	Bayfield County Jail	274	not given	28.75
45	2/18	City Clerk's Office	275	3720407	11.75
46	2/18	Carl Lindstrom	196	3720394	6.75
47	2/23	Bayfield County Court House	67	3745064	42.25
48	2/21	Washburn Hospital	716	not given	18.00
49	3/14	Walter Veno	296	3720385	6.90
50	3/16	Doyle Store (M. P. Doyle)	58	3720392	6.25
51	3/29	Mrs. Chas. Siminen	— not installed.		6.75
52	3/11	Nick Peterson	— not installed.		5.25

*Minimum.

[fols. 128-138] The defendants then offered in evidence Exhibit "P," an affidavit of Frank C. Thiesen, with attached blue prints consisting of a graph and supporting data, as follows:

EXHIBIT "P"

Title and venue omitted

Frank C. Thiesen, being first duly sworn, on oath says that the attached blue prints consisting of a graph and supporting data, correctly shows fluctuations of prices of six inch Class B cast iron water pipe, in carload lots, F. O. B. Chicago, as published in Iron Age and other magazines.

Frank Thiesen.

Jurat omitted.

Here appears Graph showing fluctuations in prices of cast iron pipe, and nine (9) Blue Print Copies of Data from which the Graph was prepared.

[fol. 139] Defendants then offered the affidavit of Frank C. Thiesen in evidence, marked Exhibit "R," as follows:

EXHIBIT "R"

Title and venue omitted

Frank C. Thiesen, being first duly sworn on oath says that the population of the city of Washburn, Bayfield County, Wisconsin, for the years 1905, 1910 and 1920, according to the Wisconsin Blue Book was respectively as follows:

1905	4,924
1910	3,830
1920	3,707

Affiant further states that an examination of the records of the Railroad Commission shows that between the years 1910 and 1921 the Washburn Water Works Company made no application for an increase in its water rents.

Frank C. Thiesen.

Jurat omitted.

The plaintiffs objected to the introduction of Exhibit "R" on the ground that it was irrelevant and immaterial to the issues in the case. The objection of the plaintiffs was overruled and the plaintiffs then and there duly excepted.

[fol. 140] The defendants then offered in evidence an affidavit of Frank C. Thiesen, together with data showing the number of customers of the Washburn Water Works Company from 1920 to 1928, marked Exhibit "T," as follows:

EXHIBIT "T"

Title and venue omitted

Frank C. Thiesen, being first duly sworn, on oath says that he is an engineer employed by the Railroad Commission of Wisconsin; that attached hereto is a compilation of figures showing the number of customers of the Washburn Water Works Company during the period of 1920 to 1928,

inclusive; that said figures were obtained from the annual reports submitted by the Washburn Water Works Company to the Railroad Commission of Wisconsin; that said figures have been correctly copied from said reports.

Frank C. Thiesen.

Jurat omitted.

Data from Annual Reports of the Washburn Water Works Company

Year	Consumers	Meters	Services connected (including hydrants)	Pumpage during the year, gallons
1928	537	172	621	59,340,000
1927	525	150	608	68,550,000
1926	585	112	657	97,311,264
1925	558	72	631	135,961,411
1924	588	47	624	146,051,576
1923	...	47	610	155,815,111
1922	541	47	624	169,264,142
1921	570	...	651	171,682,162
1920	...	...	665	164,282,880

The defendant then offered Exhibit "U," consisting of an affidavit of Frank C. Thiesen and supporting memoranda, as follows:

EXHIBIT "U"

Title and venue omitted

Frank C. Thiesen, being first duly sworn, on oath says that he is an engineer employed by the railroad commission [fol. 141] of Wisconsin; that he has made an investigation to determine whether the operating expenses of the Washburn Water Works Company can reasonably be reduced; that attached hereto and forming a part hereof is a memorandum prepared by this affiant under date of April 5, 1929; that there is also attached hereto a memorandum dated March 22, 1928; that there is also attached carbon copy of a letter written by this affiant to Lake Superior District Power Company, together with a reply from said Company; there is also attached original letter received from Wisconsin Foundry and Machine Company, and in addition a booklet put out by Goulds Pumps, Inc.; that the statements contained in said memorandum are true; that

the affiant's belief as to the possibility of reducing the operating costs of the Washburn Water Works Company is based upon his own investigation and the information contained in the papers attached hereto.

Frank C. Thiesen.

Jurat omitted.

Memorandum (Formal Parts Omitted)

Submitted herewith is an earlier memorandum and certain correspondence relating to an investigation to determine what saving in operating expenses might be made in the pumping station at Washburn. The study followed the installation of the 1,000-gallon electric driven pump, the report of an usually high cost of pumping, and the hearing in Washburn February 1, 1928.

A definite proposal was adopted for the purpose of interviewing and securing data from pump maker's representatives. Informal interviews were had with an engineer for the Allis-Chalmers Company of Milwaukee, and Mr. G. W. Botham, representative for Goulds pumps in the Madison territory, and with Mr. Hodgkins of the Lake Superior District Power Company. The use of a triplex pump appeared best and accordingly the report was made upon such basis. The price given by the Wisconsin Foundry and Machine Company is not competitive, and additional saving might be made by further reducing the size [fol. 142] of the motor and pump, thereby increasing the hours of pumping and the load factor, resulting in reducing the unit cost for power.

The annual report of W. G. Maxcy, Receiver of the Washburn Water Works Company, for the year ended December 31, 1928, indicates 172 meters in use, with a total number of services reported of 661. The ratio of services upon a metered basis is near 28%. By increasing the number of metered consumers, experience elsewhere shows that the pumpage may be reduced, thus directly reducing the cost of power for pumping. Attached to this memorandum is a copy of the record taken from the meter installation book of the superintendent. Mr. Jack Smith, in the office of the Washburn Water Works Company at Washburn showing 50 additional meters installed since

January 10, 1929. The average deposit made by the consumers for these fifty consumers is $9.80.

[fol. 143] Memorandum (Formal Parts Omitted)

An investigation has been made of a poposed change in method and equipment necessary for pumping water at the plant of the Washburn Water Works Company at Washburn.

At present the equipment consists of a motor driven centrifugal pump of a 1,000 gallon per minute rated capacity pumping three or four hours per day to a reservoir upon the hillside above the city. With the 125 H. P. motor driving this pump and the short period of operation, the demand upon the lines of the Lake Superior District Power Company has resulted in a rate for power of about four cents per kilowatt hour.

In order to reduce the demand and the rate, it is proposed to decrease the demand by installing an additional pump and smaller motor, increasing the period of pumping correspondingly.

Quotations from pump dealers indicate that a suitable triplex pump may be installed for approximately $2,500. Such a pump would itself when in proper working order and after starting might be left to run until cut off by an automatic switch. At present an operator remains at the station during the pumping period and, in addition, during freezing weather is required to visit the station about three times a day to maintain a fire in a heating stove. The new arrangement would require the same visits, although remaining with the pump would not be required except to oil or grease the pump and to see it started and in proper working order.

It is not proposed to dispense with the large centrifugal pump for it is needed at times when the reservoir has an insufficient supply of water for fires. In order to secure the lower rate for power the large motor and pump must be idle and with intelligent operation and fortunate distribution of large fires or other necessity of operating the large pump a substantial saving may be made. The margin appears to be sufficient to write off the fixed charges and the cost of additional equipment and labor of installation within a few years assuming occasional use of the

large pump and motor now installed with wise handling, proper installation and cooperation, and favorable circumstances, the saving may amount to two thousand dollars a year.

[fol. 144] The plaintiffs objected to the introduction of Exhibit "U" on the ground that the conclusions arrived at are based upon conclusions which are purely hearsay and for the further reason that it is irrelevant and immaterial, and that there is no sufficient foundation laid for Mr. Thiesen's conclusions, he not being a practical water works man, or a man experienced in that line of work. The plaintiffs' objection was overruled, to which ruling the plaintiffs then and there duly excepted.

Defendants then offered the affidavit of A. A. Borucki, marked Exhibit "V," as follows:

EXHIBIT "V"

Title and venue omitted

Rev. A. A. Borucki, being first duly sworn, on oath says that he is and ever since the year 1919 has been the duly appointed and licensed Catholic Priest and Pastor in charge of St. Louis Catholic Congregation, being the only Catholic Congregation in the City of Washburn, of Bayfield County, Wisconsin, and that he has continuously since the year 1919 had charge of said Congregation and of the records of said Congregation. That in the year 1917, as appears by the records of said Congregation, there were 1,265 members of said Congregation in said City. There *there* has been a constant decline in the number of the members of said Congregation, commencing in the year 1919, when the membership of the congregation was 1,135, down to the present time, and that the membership of the Congregation of said church for the year 1928 is 544 persons, and that the reason for the shrinkage and decline in the number of the membership of said Congregation is that the memvers in said Congregation have been moving away from Washburn to other localities.

Rev. A. A. Borucki.

Jurat omitted.

[fol. 145] The defendants then offered in evidence the affidavit of Chr. Christiansen, marked Exhibit "W," as follows:

EXHIBIT "W"

Title and venue omitted

Rev. Chr. Christiansen, being first duly sworn, on oath says that he is the Pastor of the Norwegian Evangelical Lutheran Congregation of the City of Washburn and in charge of such Congregation. That affiant has been such Pastor of said Congregation for about twenty-two years last past. That in the last six or seven years there has been a very substantial shrinkage in the number of said members of said congregation and that from the best figures which affiant is able to obtain affiant verily believes that in the year 1914 there were 435 members of said Congregation and that at the present time said membership has shrunk to 245. That said Norwegian Evangelical Lutheran Congregation is the only one in said City. That the shrinkage in the membership thereof is due entirely to the general decrease in the population of said City of Washburn and is substantially in proportion thereto.

Rev. Chr. Christiansen.

Jurat omitted.

[fol. 146] The defendants then offered in evidence the affidavit of James M. Long, marked Exhibit "X," as follows:

EXHIBIT "X"

Title and venue omitted

James M. Long, being first duly sworn, on oath says that he is and since 1926 has continuously been chief of Police of the City of Washburn, and that he has resided in the City of Washburn continuously for a period of about thirteen years, with the exception of two years when he was temporarily absent. That he is well acquainted with said city and with the people thereof and with the geography of said City. That he is familiar with said City and with the places of business and people therein and that

the chief and only important business street in said city if Bayfield Street. That said street was paved in the year 1916 and is the only paved street in said city and the pavement extends from First Avenue East to Eighth Avenue West, a distance of more than nine blocks, and that the length of said blocks is 400 feet, including on each side of the street sixteen lots, with the exception of the block between Seventh and Eighth Avenues West, which is a block of 300 feet. That there are fifteen vacant lots on the North side of said street in the first block west of First Avenue East and on the south side of said street between First Avenue East and Central Avenue there are nine vacant lots. That between Central Avenue and First Avenue West on said street there are eleven vacant lots on the north side and eleven vacant lots on the south side. That between First Avenue West and Second Avenue West there are nine empty lots on the north side and nine empty lots on the South side of said street. That between Second Avenue West and Washington Avenue the north side of the street is vacant, except that a portion of it is occupied by a filling station and there are three vacant lots on the south side of said street. That between Washington Avenue and Third Avenue West, there are eight vacant lots on the south side and the north side is vacant, except that there are three residences thereon. That between Third Avenue [fol. 147] West and Fourth Avenue West, there are eleven vacant lots on the north side of said street and nine vacant lots on the south side. That between Fourth Avenue West and Fifth Avenue West, there are ten vacant lots on the north side and thirteen vacant lots on the south side of said street. That between Fifth Avenue West and Sixth Avenue West, there are thirteen vacant lots on the north side and twelve vacant lots on the south side of said street. That between Sixth Avenue West and Seventh Avenue West, there are twelve vacant lots on the north side and fourteen vacant lots on the south side of said street. That between seventh Avenue West and Eighth Avenue West, there are nine vacant lots on the north side and ten vacant lots on the south side of said Bayfield Street.

James M. Long.

Jurat omitted.

The defendants then introduced the affidavit of Nels Myhre, marked Exhibit "Y," as follows:

EXHIBIT Y

Title and venue omitted

Nels Myhre, being first duly sworn, on oath says that he is the duly elected, qualified and acting Register of Deeds of Bayfield County and that he has been such officer for more than twenty years last past. That it appears from the records in the office of Register of Deeds that a conveyance of Lot four (4) in Block one hundred nineteen (119) of the Original plat of the City of Washburn, in Bayfield County, Wisconsin, was made by the Bay Land Improvement Company as grantor to Washburn Water Works Company, under date of the 15th day of May, 1890, which conveyance was recorded in the office of the Register of Deeds in Bayfield County, on the 28th day of May, 1890, in Volume 18 of Deeds on page 224. That the consideration and purchase price expressed in said deed was the sum of One Thousand ($1,000.00) Dollars and that the quantity of land embraced in said Lot four (4) was not to exceed one-third of an acre.

Nels Myhre.

Jurat omitted.

[fol. 148] The defendants then introduced the affidavit of W. A. Robinson, marked Exhibit "Z," as follows:

EXHIBIT "Z"

Title and venue omitted

W. A. Robinson, being first duly sworn, on oath says that he is a resident of the city of Washburn, and has resided in said City for more than thirty-five years. That affiant is Editor of the Washburn Times, a weekly newspaper which has been published continuously in said City of Washburn for about thirty-five years, and that affiant is the manager of Washburn Printing Company, a Wisconsin corporation, engaged in the general printing business at said city of Washburn. That affiant is familiar with the

affairs of said City and has personal acquaintance with practically every person residing therein. That sometime in the year 1928 for the purpose of ascertaining whether or not the circulation of said Washburn Times was as great as it should be, having regard to the population of said City and the community in which said newspaper chiefly has its circulation, affiant carefully estimated and checked over the population of said City of Washburn and derived at the conclusion and is of the opinion that the population of said City was about Twenty-seven hundred (2,700). That affiant has di-cussed the matter with other citizens of said City well informed in relation to the matter of population and that it is the general and prevailing opinion that the population of said City of Washburn is well below three thousand (3,000) inhabitants, and that said population has been shrinking regularly and continuously for the past six years or more and that the shrinkage in said population still continues. That there are no industries in said City of Washburn to employ labor except an Excelsior Factory which employs about 25 people and a coal dock which employs on the average of about 15 men. That the E. I. Du Pont De Nemours & Company operates an explosives plant at Barksdale where about 300 men are regularly employed. That about 200 of them are residents of the City of Washburn and that they constitute about the [fol. 149] only source of income for said city and that their earnings and expenditures in said City constitutes substantially the only source of revenue of the business people of said City.

W. A. Robinson.

Jurat omitted.

The plaintiffs duly objected to the introduction of Exhibits "V" "W" "X" "Y" and "Z" on the ground and for the reason that they are irrelevant and immaterial and that the testimony of the affiants in Exhibits "V" and "W" is entirely irrelevant to any consideration of this case, and there *there* is no sufficient foundation laid for the testimony of Nels Myhre in Exhibit "Y." The court duly overruled the objection, to which ruling of the court the plaintiffs then and there duly excepted.

The defendants then offered the affidavit of V. E. Kimball, marked Exhibit "BB," as follows:

EXHIBIT "BB"

Title and venue omitted

V. E. Kimball, being first duly sworn, on oath says that he is the City Superintendent of the public schools in the City of Washburn, and has occupied that office for several years last past. That he is custodian of the records of the schools of said City. That there are four public school buildings in said city and that there are no private or parochial schools, teaching general subjects of education. That in the year 1924, as appears from the census reports in affiant's possession, there were 1,252 children of school age within said city, but that affiant believes that said census report for said year 1924 is inaccurate and that there were many more children of school age in said city at that time. It further appears that in the year 1925, the school census report shows 1,390 children of school age in said City of Washburn. That in the year 1926, said census report shows 1,390 school children in said city. That in [fol. 150] the year 1927, said census report shows 1,033 children of school age in said city, and that in the year 1928, said census report shows 986 children of school age in said City of Washburn.

That affiant is informed and verily believes that there has been a constant and rapid reduction in the number of children of school age in the City of Washburn since the year 1922 and 1923.

V. E. Kimball.

Jurat omitted.

The defendants then offered the affidavit of Ludwig Tranmel, marked Exhibit "CC," and the affidavit of R. W. Smith, marked Exhibit "DD," together with map referred to in both affidavits. The affidavit of Ludwig Tranmel is as follows:

EXHIBIT "CC"

Title and venue omitted

Luwig Tranmel, being first duly sworn, on oath says that he is the duly elected, qualified and acting County Clerk of

Bayfield County and that he has been such County Clerk continuously for more than five years last past. That as such County Clerk, he is the custodian of the records showing the ownership of real estate acquired by tax title owned by said County. That affiant has carefully examined the annexed plat and diagram of the City of Washburn with the records in his office and that said annexed plat and diagram of said City shows in red the lots, blocks and parcels of land belonging to Bayfield County acquired by tax deed and that said County is the owner of said lots, blocks and parcels so shown in red on said map.

Ludwig Tranmel.

Jurat omitted.

[fol. 151] The affidavit of W. R. Smith is as follows:

EXHIBIT "DD"

Title and venue omitted

R. W. Smith, being first duly sworn, on oath says that he is the duly elected, qualified and acting County Treasurer of Bayfield County in the State of Wisconsin, and that he has been such County Treasurer continuously for about eight years last past. That as such Treasurer he has the custody and possession of the delinquent tax records of the City of Washburn, as well as all of the county tax records of Bayfield County.

That affiant has carefully examined the annexed plat or diagram of the City of Washburn and that the same is a true plat and diagram of said City, except that there are certain suburban additions not shown thereon. That the annexed plat and diagram shows the business section of said City and practically all of the residential district. That the parcels marked in green crayon on the annexed plat and diagram indicate lots and blocks upon which the taxes are delinquent for one or more years. That the total amount of the tax roll for the year 1928 was $80,290.02, and that the amount returned delinquent for said year was $21,381.50.

R. W. Smith.

Jurat omitted.

The plaintiffs duly objected to the introduction in evidence of Exhibits "BB" "CC" and "DD" on the ground that they are irrelevant and immaterial to the issues in this controversy. Plaintiffs' motion was overruled, to which ruling of the court the plaintiffs then and there duly excepted.

Whereupon the defendants rested their case.

And the plaintiffs to further maintain the issues on their part, introduced the following evidence in rebuttal:

[fol. 152] Counsel for the plaintiffs stated that in view of some of the testimony that had been offered, but reserving his objection to the materiality of the evidence, he offered in evidence the affidavit of W. G. Maxcy, marked Plaintiffs' Exhibit 5, as follows:

EXHIBIT 5

Title and venue omitted

W. G. Maxcy, being first duly sworn on oath, deposes and says that he is one of the plaintiffs in the above entitled action, and makes this affidavit for and in behalf of the plaintiffs.

Affiant has caused an investigation to be made of the assessed and true valuation of property in the City of Washburn for the period from 1914 down to and including 1928 and such study shows the following assessed and true valuation for the assessable property of said city for the aid period:

	Assessed	True
1914	$1,239,927	$1,241,223
1915	1,224,680	1,295,776
1916	1,945,700	1,518,638
1917	1,779,414	1,609,271
1918	3,470,487*	2,530,093

(*) With respect to the assessment of 1918 made by the City of Washburn, the records of the income tax assessor for the district comprising Washburn show that the property in Washburn for that year was overassessed by about One Million Dollars. A note to the annual report of said assessor reads as follows: "The assessor placed upon the assessment roll under the head of 'Manufacturers' Stock,' an assessment against the E. I. Du Pont de Nemours Company of $1,149,000. From information at hand I understand there was not to exceed $149,000 of this property subject to assessment, and fof that reason my true value for manufacturers' stock in the City of Washburn is $149,000."

	Assessed	True
1919	2,574,389	2,609,668
1920	2,425,444	2,519,747
1921	2,353,703	2,338,622
1922	1,952,542	2,011,700
1923	1,833,967	1,953,694
1924	1,478,472	1,557,939
1925	1,644,054	1,493,892
1926	1,662,896	1,457,405
1927	1,701,743	1,513,253
1928	1,577,504	1,342,480

[fol. 153] This assessment of course was not contested by the company, for the reason that by the operation of the Wisconsin law permitting the offset of personal property taxes against income taxes, said company merely paid the personal property tax and presented the receipt therefor to the collector in payment or offset of the income taxes, but said operation resulted in giving to the City of Washburn a larger amount of taxes than it would have received from the State of Wisconsin, and hence the practice above referred to by the income tax assessor was followed.

All of the information above referred to was obtained from the annual reports of income tax assessor Pierce Tompkins of Ashland, Wisconsin.

Affiant further says that according to the tax roll warrants of said City of Washburn, the indebtedness of said City on December 15th, 1913, was $35,692.50; on December 24th, 1924, a similar warrant showed an indebtedness of $71,276.40; on December 8th, 1925, a similar warrant showed an indebtedness of $73,000; on December 20th, 1926, a similar warrant showed an indebtedness of $85,393.75 on December 22nd, 1927, a similar warrant showed an indebtedness of $37,000, and on January 1st, 1929, a similar warrant showed an indebtedness of $33,000, so that the present indebtedness of the City of Washburn is less than it was in 1913, and has been reduced over 50% during the past few years.

Affiant further says that the annual reports of said Company show the following number of customers of said Water Company from 1913 to 1928:

[fol. 154]

	Hydrants		Customers
1913	76		496
1914	76		487
1915	76		556
1916	76		626
1917	76		656
1918	76		693
1919	81	June 30	706
1919	81	Dec. 31	668
1920	81		665
1921	81		651
1922	81		624
1923	83		630
1924	83		624
1925	83		631
1926	83		657
1927	83		608
1928	83		621

W. G. Maxey.

Jurat omitted.

No further evidence was offered in the cause.

During the argument before the court, Mr. Arnold, attorney for the defendants, stated in response to a question propounded by the court, that the depreciated value of $87,116.00, fixed by the order of the Railroad Commission dated December 4, 1928, did not include materials and supplies; that the Railroad Commission took the position that if said value were set up to include working capital, materials and supplies, the sum of $1,700.00 for working capital, and the sum of $800.00 for materials and supplies, should be added, making a total valuation as of December 4, 1928, including working capital, materials and supplies of $89,616.00.

[fols. 155 & 156] ORDER APPROVING CERTIFICATE OF EVIDENCE AND EXCEPTIONS

The foregoing certificate of evidence and exceptions, prepared under equity rules, was on the 27 day of June, 1929,

presented to me, also an agreement and stipulation signed by counsel of record for both plaintiffs and defendants, waiving the setting of the time and place for the presentation of approval for said certificate of evidence and exceptions, and waiving notice of such presentation, and it also being shown and made known to me by said agreement that counsel for both plaintiffs and defendants had agreed that said certificate of evidence and exceptions was correct, and had been approved by the parties through their respective counsel, and waiving the presence of counsel for both plaintiffs and defendants, the said certificate of evidence and exceptions are now here approved by the court as being a correct certificate of evidence and exceptions of the proceedings had upon the trial of said cause, and the clerk of the District Court of the United States for the Western District of Wisconsin, setting at Madison, Wisconsin, will transmit a copy thereof, as provided under the rules for making up the record for appeal as though Rule 75 had been fully complied with in all respect.

Witness my hand this 27 day of June, 1929.

C. Z. Luse, Judge of the District Court of the United States for the Western District of Wisconsin.

Approved: —— ——.

Here appears Stipulation waiving Notice of Lodgment of Certificate of Evidence and Exceptions with the Clerk of the District Court, waiving setting of time and place for approval of Certificate of Evidence and Exceptions, approving Certificate of Evidence and Exceptions, and waiving appearance of counsel at time of approval of Certificate of Evidence.

[fol. 157] In United States District Court

Stipulation and Order to Send Exhibits to Supreme Court of the United States with Transcript—Filed June 27, 1929

It is hereby stipulated by and between the parties to the above entitled action, that in addition to the transcript

of the record on appeal in this suit the clerk of this court shall transmit to the clerk of the supreme court of the United States the following original exhibits in this suit:

1. That part of Exhibit "K" consisting of a map and nine (9) photographs.

2. That part of Exhibits "CC" and "DD" consisting of a map.

Dated June 27, 1929.

H. L. Butler, R. M. Rieser, Attorneys for Plaintiffs and Appellees. John W. Reynolds, Attorney General of Wisconsin; Suel O. Arnold, Assistant Attorney General of Wisconsin, Attorneys for Defendants and Appellants.

[fol. 158] Upon the annexed and foregoing stipulation, and on motion of John W. Reynolds, Attorney General of the State of Wisconsin and Suel O. Arnold, Assistant Attorney General of the State of Wisconsin, attorneys for defendants and appellants, it is

Ordered that in addition to the transcript of the record on appeal in this suit that the clerk of this court transmit to the clerk of the supreme court of the United States the following original exhibits in this suit to be by him safely kept and returned to this court upon the final determination of the appeal in this suit in said supreme court of the United States, viz.:

1. That part of Exhibit K consisting of a map and 9 photographs.

2. That part of Exhibits CC and DD consisting of a map.

Dated this 27th day of June, 1929.

C. Z. Luse, District Judge of the United States District Court for the Western District of Wisconsin.

[fols. 159-161] Here appears præcipe for Transcript on said Appeal, and Admission of due Service thereon.

[fol. 162 & 163] Citation, in usual form, showing service on H. L. Butler and R. M. Rieser, filed June 27, 1929, omitted in printing.

[fol. 164] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR ORDER EXTENDING TIME—Filed July 26, 1929

The petition of the railroad commission of Wisconsin, Lewis E. Gettle, Adolph Kanneberg and A. R. McDonald, as members thereof, and John W. Reynolds, as Attorney General for the state of Wisconsin would respectfully show that on the 5th day of April, 1929, there was rendered by George T. Page, Circuit Judge, F. A. Geiger and C. Z. Luse, District Judges, a decree granting to W. G. Maxcy, as Receiver of the Washburn Water Works Company, and the Washburn Water Works Company, a perpetual injunction as prayed for in the original bill in this cause, and your petitioners would further show that they have been allowed by your Honor an appeal to the Supreme Court of the United States from that decree, and that citation has been issued by your Honor for the plaintiffs, returnable on the 27th day of July, 1929.

Your petitioners would further show that the transcript of said record has been prepared and filed with the Clerk of the District Court of the United States for the Western District of Wisconsin, but that by reason of the volume of work in the office of the said clerk it will be impossible for [fol. 165] him to prepare the said record for appeal by the 27th day of July, 1929, and for that reason it will be impossible for your petitioners to file the record in said cause in the Supreme Court of the United States by the 27th day of July, 1929.

The premises considered, your petitioners pray that they be granted an enlargement of time in which to file the record in the supreme court of the United States, and to docket said cause in the Supreme Court of the United States, and that they be allowed thirty (30) days from July 27th, 1929, in addition to the time allowed by law, within which to file said record in the Supreme Court of the United States.

Dated this 22nd day of July, 1929.

John W. Reynolds, Attorney General for the State of Wisconsin; Suel O. Arnold, Assistant Attorney General for the State of Wisconsin, Attorneys for Defendants.

Due service of the within petition admitted this 22nd day of July, 1929. The plaintiffs hereby consent to the entry of an order enlarging the time within which the defendants may file the record in this cause in the Supreme Court of the United States and to docket said cause in the Supreme Court of the United States.

Dated this 22nd day of July, 1929.

H. L. Butler, R. M. Leiser, Attorneys for Plaintiffs.

[fol. 166] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER EXTENDING TIME—Filed July 26, 1929

This cause came on this day to be heard on a petition by the Railroad Commission of Wisconsin, Lewis E. Gettle, Adolph Kanneberg and A. R. McDonald as members thereof, and John W. Reynolds as attorney general for the state of Wisconsin, praying for an enlargement of time in which to file the record in this cause in the Supreme Court of the United States and to docket said cause in the Supreme Court of the United States, and

It appearing to the court that the defendants will hardly have time in which to file the record in the Supreme Court of the United States by the 27th day of July, 1929, which is the time required by law,

It is thereupon ordered, adjudged and decreed that the said defendants and appellants be, and they are hereby allowed, in addition to the thirty (30) days allowed them by law, thirty (30) days from July 27th, 1929, in which to file the record in this cause in the Supreme Court of the United States, and to docket said cause in the Supreme Court of the United States.

[fol. 167] Ordered, adjudged and decreed this 24th day of July, 1929.

C. Z. Luse, District Judge of the District Court of the United States for the Western District of Wisconsin.

[fol. 168] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 169] SUPREME COURT OF THE UNITED STATES.

STATEMENT OF POINTS TO BE RELIED UPON AND STIPULATION AS TO PARTS OF RECORD TO BE PRINTED—Filed Aug. 7, 1929

Appellants state that in pursuance of the rule of the Supreme Court of the United States requiring such statement that they expect to rely on each and all of the assignments of errors which are attached to the record filed in this case.

It is stipulated that this case may be docketed at once.

It is further stipulated that the following parts of the record need not be printed, and that the same are not necessary for a consideration of the assignment of errors, or any of them, and that the remaining portions of the record shall be printed:

1. Omit Bond on Restraining Order, pages 62 and 63 of the Record, and insert in lieu thereof, the following:

"Here appears Bond filed upon issuing the Preliminary Restraining Order and approved by the District Judge."

[fol. 170] 2. Omit Bond on Restraining Order, pages 66 and 67 of the Record and insert in lieu thereof, the following:

"Here appears Bond filed in connection with Extension of Restraining Order."

3. Omit Bond on Restraining Order, pages 88 and 89 of the Record and insert in lieu thereof, the following:

"Here appears Bond in connection with Extension of Restraining Order and approved by the District Judge."

4. Omit Notice of Motion to strike out paragraph 24 of Answer, page 90 of the Record, and insert in lieu thereof, the following:

"Here appears notice of Motion to strike out paragraph 24 of the Answer."

5. Omit Bond on Appeal, pages 99 and 100 of the Record, and insert in lieu thereof, the following:

"Here appears Bond on Appeal duly approved by District Judge."

6. Omit Precipe for the Transcript on said Appeal, pages 159, 160 and 161 of the Record, and insert in lieu thereof, the following:

"Here appears Precipe for Transcript on said Appeal, and Admission of due Service thereon."

7. Omit that part of Exhibit "P," consisting of a Graph and nine Blue Print Copies of Supporting Data, pages 129 to 138, inclusive, of the Record, and insert in lieu thereof, the following:

"Here appears Graph showing fluctuations in prices of cast iron pipe, and nine (9) Blue Print Copies of Data from which the Graph was prepared."

[fol. 171] 8. Omit Stipulation waiving Notice of Lodgment of Certificate of Evidence and Exceptions with the Clerk of the District Court, waiving setting of time and place for approval of Certificate of Evidence and Exceptions, and waiving appearance of counsel at time of approval of Certificate of Evidence and Exceptions, page 156 of the Record, and insert in lieu thereof, the following:

"Here appears Stipulation waiving Notice of Lodgment of Certificate of Evidence and Exceptions with the Clerk of the District Court, waiving setting of time and place for approval of Certificate of Evidence and Exceptions, approving Certificate of Evidence and Exceptions, and waiv- Appearance of counsel at time of approval of Certificate of Evidence."

It is further stipulated and agreed that if from oversight or omission, any necessary part of the record be not thus printed, that the appellants have the right to print, or may be required by the appellees to print, any further or additional portions thereof.

It is hereby stipulated and agreed that both appellants and appellees waive any right to further reduce or diminish the printed record, and request that the record be at once printed.

Dated this 3rd day of August, 1929.

A. L. Butler, R. M. Rieser, Attorneys for Plaintiffs and Appellees. John W. Reynolds, Attorney General of Wisconsin; Suel O. Arnold, Assistant Attorney General of Wisconsin, Attorneys for Defendants and Appellants.

[fol. 172] [File endorsement omitted.]

Endorsed on cover: File No. 34,432. W. Wisconsin D. C. U. S. Term No. 301. Railroad Commission of Wisconsin, Lewis E. Gettle, Adolph Kanneberg, et al., etc., appellants, vs. W. G. Maxcy, as receiver of the Washburn Water Works, and Washburn Water Works Company. Filed August 6, 1929. File No. 34,432.

FILE COPY

AUG 17

CHARLES ELMO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1929

No. 301

RAILROAD COMMISSION OF WISCONSIN, LEWIS E. GETTLE, ADOLPH KANNEBERG and A. R. McDONALD, as members thereof, and JOHN W. REYNOLDS, as ATTORNEY GENERAL FOR THE STATE OF WISCONSIN,

Defendants and Appellants,

v.

W. G. MAXCY, as Receiver of the Washburn Water Works Company, a Wisconsin Corporation, and WASHBURN WATER WORKS COMPANY, a Wisconsin Corporation,

Plaintiffs and Appellees.

Statement As To Jurisdiction of the Supreme Court of the United States

JOHN W. REYNOLDS,
Attorney General of the State of Wisconsin,

SUEL O. ARNOLD,
Assistant Attorney General of the State of Wisconsin,

Attorneys for Defendants and Appellants.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1929

No. 301

RAILROAD COMMISSION OF WISCONSIN, LEWIS E. GETTLE, ADOLPH KANNEBERG and A. R. McDONALD, as members thereof, and JOHN W. REYNOLDS, as ATTORNEY GENERAL FOR THE STATE OF WISCONSIN,

Defendants and Appellants,

v.

W. G. MAXCY, as Receiver of the Washburn Water Works Company, a Wisconsin Corporation, and WASHBURN WATER WORKS COMPANY, a Wisconsin Corporation,

Plaintiffs and Appellees.

Statement As To Jurisdiction of the Supreme Court of the United States

In compliance with Rule 12 of the Supreme Court of the United States, the defendants and appellants submit their statement disclosing the basis on which it is contended that the Supreme Court of the United States has jurisdiction to review on appeal the decree entered by the District Court of the United States for the Western District of Wisconsin, in favor of the plaintiffs and appellees, and against the defendants and appellants.

I

STATUTORY PROVISIONS RELIED ON TO SUSTAIN JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

Defendants and appellants contend that sections 345 and 380 of Title 28, United States Code (sections 238 and 266, Judicial Code) sustain the jurisdiction of the Supreme Court of the United States on this appeal. These sections provide as follows:

Section 345. (Section 238, Judicial Code, as amended by Act of February 13, 1925, 43 St. at L. 936)

> "A direct review of the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following sections and not otherwise.
>
> * * *
>
> (3) Section 380 of this title.
>
> * * *."

Section 380. (Section 266, Judicial Code, as amended by Act of February 13, 1925, 43 St. at L. 936)

> "No interlocutory injunction suspending or restraining the enforcement, operation or execution of any statute of a State by restraining the action of any officer of such State in the enforcement or execution of such statute, or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such State, shall be issued or granted by any justice of the Supreme Court, or by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the Su-

preme Court of the United States, or to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a justice of the Supreme Court or a circuit judge, and the other two may be either circuit or district judges, and unless a majority of said three judges shall concur in granting such application. Whenever such application as aforesaid is presented to a justice of the Supreme Court, or to a judge, he shall immediately call to his assistance to hear and determine the application two other judges: *Provided, however,* That one of such three judges shall be a justice of the Supreme Court, or a circuit judge. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the governor and to the attorney general of the State, and to such other persons as may be defendants in the suit: *Provided,* That if of opinion that irreparable loss or damage would result to the complainant unless a temporary restraining order is granted, any justice of the Supreme Court, or any circuit or district judge, may grant such temporary restraining order at any time before such hearing and determination of the application for an interlocutory injunction, but such temporary restraining order shall remain in force only until the hearing and determination of the application for an interlocutory injunction upon notice as aforesaid. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case. It is further provided that if before the final hearing of such application a suit shall have been brought in a court of the State having jurisdiction thereof under the laws of such State, to enforce such statute or order, accompanied by a stay in such State court of proceedings

under such statute or order pending the determination of such suit by such State court, all proceedings in any court of the United States to restrain the execution of such statute or order shall be stayed pending the final determination of such suit in the courts of the State. Such stay may be vacated upon proof made after hearing, and notice of ten days served upon the attorney general of the State, that the suit in the State courts is not being prosecuted with diligence and good faith. The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the district court; and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit."

II

DATE OF DECREE SOUGHT TO BE REVIEWED AND DATE ON WHICH APPLICATION FOR APPEAL WAS PRESENTED

The decree which the appellants seek to have reviewed by the Supreme Court of the United States, was signed by G. T. Page, Circuit Judge, F. A. Geiger and C. Z. Luse, District Judges, and filed on the 5th day of April, 1929 (record, pages 92-93). The petition for appeal was presented, allowed and filed on June 27th, 1929 (record pages 94-95).

III

NATURE OF THE CASE IS SUCH AS TO BRING IT WITHIN THE PROVISIONS OF SECTION 266 OF THE JUDICIAL CODE

The Washburn Water Works Company is a duly organized and existing corporation, engaged in the public

utility business in the city of Washburn, State of Wisconsin, and furnishes water to the inhabitants of the said city of Washburn, Wisconsin (record, page 5). The plaintiff, W. G. Maxcy, is the duly appointed, qualified and acting receiver of the Washburn Water Works Company (record, page 5). On December 4, 1928, the Railroad Commission of Wisconsin entered an order fixing the rates to be charged by the plaintiff W. G. Maxcy, as receiver for the Washburn Water Works Company (record, pages 48-52). On January 2, 1929, the plaintiffs filed their bill of complaint in equity in the District Court of the United States for the Western District of Wisconsin, in which it is alleged that the rates established by the said order of the Railroad Commission dated December 4, 1928, are confiscatory; that said order deprives the plaintiffs of their property without due process of law and denies the equal protection of the law, contrary to the Fourteenth Amendment to the Constitution of the United States (record, page 7).

The bill of complaint prays that the court grant a temporary restraining order, restraining and enjoining the defendants Railroad Commission of Wisconsin, Lewis E. Gettle, Adolph Kanneberg and A. R. McDonald, as members thereof, and John W. Reynolds as Attorney General of the State of Wisconsin, and their respective successors in office, (a) from enforcing or attempting to enforce against the plaintiffs the said order of the Commission dated December 4, 1928; (b) from interfering or attempting to interfere with the plaintiffs in charging, collecting and enforcing the rates set out in the schedule marked Exhibit "D" attached to the bill of complaint; (c) from instituting, authorizing or directing the institution of, any suit, action or actions against the plaintiffs, their agents or employes for the recovery or enforcement of any penalty under or by virtue of the statutes of the State of Wisconsin by reason of the charging, collecting and enforcing by the plaintiffs

of the rates provided in Exhibit "D" attached to the bill of complaint (record page 27).

The bill of complaint further prays that pending final hearing in the case, a temporary injunction be issued upon such notice and after such hearing as the court may deem proper, and as by law provided, restraining and enjoining the defendants, and each of them, and their successors in office, in the same manner as hereinbefore set forth in the plaintiffs' prayer for a temporary restraining order (record page 28).

Further, the bill of complaint prays that upon final hearing of the case, the court issue its permanent injunction, restraining the defendants from interfering or attempting to interfere with the plaintiffs in charging, collecting and enforcing in the city of Washburn, the rates filed with the Railroad Commission on December 12, 1927, or such reasonable and adequate rates as shall be established upon the final hearing and trial of the case (record, page 28).

On January 3, 1929, the District Court of the United States for the Western District of Wisconsin, the Honorable C. Z. Luse, District Judge, granted a temporary restraining order, as prayed for in the bill of complaint (record, pages 60, 60a and 61). On January 12, 1929, an order was entered by the district court, Honorable C. Z. Luse, District Judge, extending the said temporary restraining order for successive ten day periods until such time as the services of two additional judges to hear the application for temporary injunction could be secured (record, pages 64-65). Thereafter and on the 22d day of March, 1929, a hearing on the temporary injunction was had before the Honorable G. T. Page, Circuit Judge, the Honorable F. A. Geiger, District Judge, and the Honorable C. Z. Luse, District Judge, pursuant to the provisions of section 266 of the Judicial Code, and at said time said cause

was adjourned to April 5, 1929 (record page 102). On the 5th day of April, 1929, a hearing and trial was had before the three judges last named, and on the 5th day of April, 1929, the said judges, the Honorable G. T. Page, Circuit Judge, the Honorable F. A. Geiger, District Judge, and the Honorable C. Z. Luse, District Judge, signed a decree permanently enjoining the defendants, Railroad Commission of Wisconsin, Lewis E. Gettle, Adolph Kanneberg, and A. R. McDonald, as members thereof, and John W. Reynolds, as Attorney General of the State of Wisconsin, from taking any steps to enforce the order of the Railroad Commission dated December 4, 1928, and permanently restraining and enjoining the said defendants from taking any steps whatever to require the plaintiffs to charge the rates prescribed by the said order of the Railroad Commission dated December 4, 1928, or to carry out any of the directions contained in the said order, and permanently enjoining and restraining the defendants from interfering with the plaintiffs in charging adequate and reasonable rates yielding a fair and adequate return upon the value of the plaintiffs' property used and useful in connection with the plaintiffs' business as a public water works utility at Washburn, Wisconsin (record pages 92-93).

It appears from the foregoing recital that an application was made to the District Court of the United States for the Western District of Wisconsin for a temporary restraining order, a temporary injunction pending the trial, and a permanent injunction restraining the defendants, as state officers, from enforcing or executing an order made by an administrative board acting under and pursuant to the statutes of the state of Wisconsin. A temporary restraining order was granted, a hearing was had on the application for a temporary injunction by three judges, and a final decree was entered by three judges, granting a per-

manent injunction. The appeal, therefore, is one which is governed by the provisions of section 266 of the Judicial Code.

IV

CASES SUSTAINING JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES TO REVIEW ON APPEAL THE DECREE BELOW

The decisions of this court fully sustain the contention of the defendants that the Supreme Court of the United States has jurisdiction to review on appeal the decree below.

The question as to whether the provisions of section 266 of the Judicial Code govern a suit to set aside an order of an administrative body, entered under and pursuant to the statutes of a State, where no claim was made that the statute authorizing the order was unconstitutional, was raised in *Oklahoma Natural Gas Company v. Russell*, 261 U. S. 290, 293. The court held that such suit was, in fact, governed by section 266 of the Judicial Code. This decision was followed in *Prendergast v. New York Teleph. Co.* 262 U. S. 43, 47, and in *Moore v. Fidelity & Deposit Co.* 272 U. S. 317, 320.

In the case at bar no claim is made by the plaintiffs that the statutes authorizing the Railroad Commission of Wisconsin are invalid and unconstitutional. Nevertheless, as was held in the above cited cases, this case is governed by section 266 of the Judicial Code.

The requirements of section 266 of the Judicial Code relating to a direct appeal to the Supreme Court of the United States from a decree entered in the District Court of the United States are satisfied where the suit is brought

to restrain the enforcement or execution, by the proper state officers, of an order of an administrative body, entered pursuant to the statutes of a state, on the ground that the order violates the Constitution of the United States; where the bill of complaint prays a temporary restraining order, a temporary injunction pending trial, and a permanent injunction; where a hearing is had on the temporary injunction, before the statutory court of three judges; where, after trial, before the statutory court of three judges, a final decree is rendered by the three judges granting a permanent injunction.

Ex parte Buder, 271 U. S. 461, 465;
Moore v. Fidelity & Deposit Co. et al., 272 U. S. 317, 321;
Smith v. Wilson, 273 U. S. 388, 390;
Clark v. Poor, 274 U. S. 552, 556;
Interstate Busses Corp. v. Blodgett, 276 U. S. 245, 249.

As pointed out in the third subdivision of this statement, the plaintiffs instituted a suit to restrain the enforcement and execution by the defendants of an order of the Railroad Commission, dated December 4, 1928, on the ground that the said order violated the Constitution of the United States. The bill of complaint prayed for a temporary restraining order, a temporary injunction, and a permanent injunction. A temporary restraining order was granted, a hearing was had on the application for a temporary injunction before the three judges, a trial was had before the three judges resulting in a decree granting a permanent injunction. This case, therefore, falls squarely within the principles established in the foregoing decisions. It follows that the Supreme Court of the United States has jurisdiction to review on appeal the decree below.

It is respectfully submitted that the Supreme Court of

the United States has jurisdiction to review the decree entered by the District Court of the United States for the Western District of Wisconsin in this suit.

Respectfully,

JOHN W. REYNOLDS,
Attorney General of the State of Wisconsin,

SUEL O. ARNOLD,
Assistant Attorney General of the State of Wisconsin,

Attorneys for Defendants and Appellants.

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CHARLES ELMORE CRO
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1929

No. 301

RAILROAD COMMISSION OF WISCONSIN, LEWIS E. GETTLE, ADOLPH KANNEBERG, ET AL., ETC.,

Appellants,

v.

W. G. MAXCY, as Receiver of the Washburn Water Works and Washburn Water Works Company.

Brief for Appellants

JOHN W. REYNOLDS,
Attorney General,

SUEL O. ARNOLD,
Special Counsel,

Attorneys for Appellants.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1929

No. 301

RAILROAD COMMISSION OF WISCONSIN, LEWIS E. GETTLE, ADOLPH KANNEBERG, ET AL., ETC.,

Appellants,

v.

W. G. MAXCY, as Receiver of the Washburn Water Works and Washburn Water Works Company.

Brief for Appellants

On April 5, 1929, a decree was handed down by the District Court of the United States for the Western District of Wisconsin, three judges sitting as a statutory court, perpetually enjoining the appellants, Lewis E. Gettle, Adolph Kanneberg, and A. R. McDonald, constituting the Railroad Commission of Wisconsin, and John W. Reynolds, as Attorney General of the State of Wisconsin, from taking any steps to enforce the order of the Railroad Commission

of Wisconsin dated December 4, 1928, and restraining the appellants from interfering with the Washburn Water Works Company or its receiver, W. G. Maxcy, in charging and collecting reasonable rates for water furnished in the city of Washburn, Wisconsin. No decision was filed by the lower court. The appellants have appealed to the Supreme Court of the United States under the provisions of sec. 238, Judicial Code, as amended by Act of February 13, 1925.

STATEMENT OF THE CASE

The Washburn Water Works Company was organized as a Wisconsin corporation in 1889 for the purpose of operating a water utility in the city of Washburn, Wisconsin (R. 103). Since the 19th day of May, 1925, the affairs of the corporation have been in charge of W. G. Maxcy, as receiver (R. 5). On December 12, 1927, the receiver attempted to file with the Railroad Commission of Wisconsin a schedule of rates in excess of the rates previously authorized by the Commission (R. 35, 55), but the Commission refused to file these schedules (R. 11, 70). Thereafter the receiver filed with the Railroad Commission of Wisconsin an application for an increase in rates (R. 11). The Railroad Commission proceeded to hold a hearing upon the application, evidence was introduced before the Commission, and on December 4, 1928, the Railroad Commission entered an order denying an increase in general service rates, but granting an increase in rates for fire protection service (R. 48-52).

Prior to December 4, 1928, the Railroad Commission of Wisconsin had made several valuations of the property of the Washburn Water Works Company. In the order entered in December, 1910, the Commission found the investment cost of the Washburn Water Works property be-

fore depreciation to be $69,348.00 and the depreciated value to be $63,803.00 (R. 9). A valuation was made by the Commission in October, 1921, in which the Commission added to the valuation made in 1910 the additions made subsequent to that date, and thereby obtained the figure of $80,792.00 which was used as a rate base by the Commission at that time (R. 10). The Railroad Commission made a valuation of the property as of June 30, 1923, in which the Commission found the value of the property based on cost of reproduction new to be $132,862.00, and the value based on a ten year average price basis to be $106,838.00, undepreciated, and a depreciated value to be $91,599.00 (R. 10). Some time later a proceeding was instituted by the city of Washburn to acquire the property of the Washburn Water Works Company, and as a part of this proceeding the Commission, under date of April 10, 1924, found the value of the Washburn Water Works property to be $50,000.00 (R. 29-41).

In the order of December 4, 1928, the Commission found a reproduction cost as of January 1, 1928, on a present price basis to be $114,089.00 and the depreciated value to be $87,116.00 (R. 48). The values thus found by the Commission did not include working capital, materials or supplies (R. 154). The Commission allowed $800.00 for materials and supplies, and $1,700.00 for working capital (R. 124). The Commission found the value of the property on a split inventory basis to be $71,530.00 (R. 39).

In the order of December 4, 1928, the Commission found that the fair value of the property of the Washburn Water Works Company for rate making purposes was $75,000.00 (R. 48). In arriving at this value the Commission called attention to the fact that property values in the city of Washburn had suffered a great decline, that there was no prospect of values increasing in the immediate fu-

ture, and that the value of the public utility property must be held to be affected by the decline in general property values in the city of Washburn (R. 48).

In establishing a rate to be charged by the Washburn Water Works Company, upon the value of $75,000.00, the Commission called attention to the fact that operating costs of the utility could be reduced by the installation of an electrical pump (R. 49-51). The Commission also pointed out that further saving in operating costs could be affected by the installation of meters (R. 51). The Commission therefore in estimating the operating expenses for the year 1929 refused to take into consideration actual past operating expenses and also refused to consider legal expenses incident to litigation between the Washburn Water Works Company and the Railroad Commission (R. 51). The order of the commission provides for a 7% return on the value of $75,000.00 (R. 52).

On the second day of January, 1929, the Washburn Water Works Company and W. G. Maxcy, as receiver, filed a bill of complaint in the District Court of the United States for the Western District of Wisconsin in which it is alleged that the value of $75,000.00 did not represent the fair value of the property, and that the rates prescribed in the order of the Commission dated December 4, 1928, were confiscatory (R. 14, 16). On January 3, 1929, the District Court of the United States for the Western District of Wisconsin issued a temporary restraining order, enjoining the appellants from interfering or attempting to interfere with the Washburn Water Works Company and its receiver W. G. Maxcy, charging and collecting rates set forth in Schedule D attached to the bill of complaint (R. 60-61). Schedule D purports to set up rates which provide a 6% return on a value of $110,000.00 (R. 53-55).

The case was tried before a statutory court, consisting of three judges (R. 102). Both the appellants and the appellees introduced evidence by way of affidavit, pursuant to stipulation (R. 102).

The utility introduced evidence showing that the value of the Washburn Water Works Company, based on cost of reproduction new was $138,537.00, and that the value depreciated was $117,952.00 (R. 114), excluding going value. The utility estimates going value at the sum of $5,000.00 (R. 110). The utility also introduced in evidence a statement of estimated operating expenses for the year 1929, including a return of 8% on a value of $122,952.00, which estimate amounted to $29,090.00 (R. 108). The Commission estimated the operating expenses for the year 1928, including a 7% return on the value of $75,000.00 to be $18,118.32 (R. 52).

After the introduction of the evidence, and after hearing arguments of counsel, the court entered a decree granting a perpetual injunction against the appellants, as prayed for by the utility, on the ground that the evidence before the Commission, and on the record herein, did not support the value of $75,000.00 established by the Railroad Commission in the order dated December 4, 1928 (R. 92-93).

SPECIFICATION OF ASSIGNED ERRORS

First. That the court erred in decreeing that the defendants, and each of them, be perpetually enjoined from taking any steps to enforce the order of the Railroad Commission, dated December 4, 1928, a copy of which is attached to the plaintiffs' bill of complaint as Exhibit C in this proceeding, and enjoining the said defendants and each of them from taking any steps whatsoever to require the plaintiffs to change the rates prescribed in the said order, or to carry out any directions contained in said order, and

enjoining the defendants and each of them from interfering with the plaintiffs in charging and collecting the rates set forth in the schedule of rates marked Exhibit D, attached to the plaintiffs' bill of complaint.

Second. That the court erred in holding that the valuation fixed by the defendant railroad commission of Wisconsin in its order dated the 4th day of December, 1928 assigning a value of $75,000.00 to the property of the plaintiffs for rate making purposes was not and is not supported on the record before the commission and on the record herein.

Third. That the court erred in failing to hold that the rates fixed by the said order of the defendant railroad commission dated December 4, 1928 were and are adequate and reasonable and yield a fair and adequate return on the value of the plaintiffs' property used and useful in connection with the plaintiffs' business as a public water utility at Washburn, Wisconsin.

SUMMARY OF ARGUMENT

I. Cost of reproduction new, less depreciation, is not the sole or dominant element of valuation, but all elements entering into the particular case should be considered.

II. Evidence of economic conditions in the community where a utility is located may be considered in fixing the value of the public utility property.

III. Order of the Commission fixing value of $75,000.00 is supported by the evidence.

1. *Value of $89,616.00, based on cost of reproduction new, is not unreasonable.*

   A. Going value.

2. *Commission accorded proper weight to cost of reproduction new.*

   A. Property values in the city of Washburn are low.
   B. Shrinkage of population.
   C. Scarcity of industries in the city.
   D. Plant as constructed is larger than required.
   E. Evidence as to conditions in the city of Washburn undisputed.

3. *Rights of the public should be considered.*

IV. Rates fixed by order of the Commission not confiscatory.

1. *Order makes proper provision for operating expenses.*

   A. Pumping costs for the year 1928 excessive.
   B. Installation of meters would result in decreased operating cost.
   C. Legal expenses should not be considered as normal operating expenses.

2. *Past losses need not be considered in fixing rates.*

3. *Return of 7% on a value of $75,000.00 not confiscatory.*

ARGUMENT

I. Cost of reproduction new, less depreciation, is not the sole or dominant element of valuation, but all elements entering into the particular case should be considered.

The decree recites that the valuation fixed by the ap-

pellant Railroad Commission of Wisconsin in its order dated December 4, 1928 assigning a value of $75,000.00 to the property of the Washburn Water Works Company for rate making purposes was not and is not supported on the record before the Commission and on the record herein (R. 92). This recital in the decree must be read in the light of the finding by the Railroad Commission that the reproduction cost of the Washburn Water Works property as of January 1, 1928, on a present price basis (excluding materials and supplies and working capital) was $114,089.00 and the value depreciated was $87,116.00 (R. 19). The Commission fixed a value of $75,000.00 for the reason, as is stated in the order, that other classes of property in the city of Washburn had suffered a great decline in value; that there is no prospect that such decline is temporary or that substantial values will be re-established; and that to hold that the water works property had not been affected by this decline would be to ignore the facts (R. 48). It is thus apparent from the face of the order of the Commission that while cost of reproduction new was considered by the Commission, it was not accorded great weight solely because property values generally in the city of Washburn had suffered a great decline. The question therefore is squarely presented as to the weight which must be accorded to cost of reproduction new.

The decisions of this court holding that cost of reproduction new must be considered in a public utility valuation case are numerous. We do not, however, find any case in which the principle is established that cost of reproduction new must be accorded dominant weight regardless of other facts and circumstances in the particular case.

In *Smyth v. Ames*, 169 U. S. 466, the United States Supreme Court in enunciating the cost of reproduction principle said, pages 546-547:

"We hold, however, that the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public. And in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. *We do not say that there may not be other matters to be regarded in estimating the value of the property.* What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth. * * *." (Italics ours.)

In *Knoxville v. Knoxville Water Company*, 212 U. S. 1, the court said, at page 9:

"* * * The cost of reproduction is one way of ascertaining the present value of a plant like that of a water company, but that test would lead to obviously incorrect results, if the cost of reproduction is not diminished by the depreciation which has come from age and use. * * *."

In this case the court recognizes that while cost of reproduction new is a factor to be considered, depreciation must also be considered.

In *Willcox v. Consolidated Gas. Co.*, 212 U. S. 19, the court said at page 52:

"And we concur with the court below in holding

that the value of the property is to be determined as of the time when the inquiry is made regarding the rates. If the property, which legally enters into the consideration of the question of rates, has increased in value since it was acquired, the company is entitled to the benefit of such increase. This is, at any rate, the general rule. We do not say there may not possibly be an exception to it, where the property may have increased so enormously in value as to render a rate permitting a reasonable return upon such increased value unjust to the public. How such facts should be treated is not a question now before us, as this case does not present it. We refer to the matter only for the purpose of stating that the decision herein does not prevent an inquiry into the question when, if ever, it should be necessarily presented."

In *Minnesota Rate Cases,* 230 U. S. 352, the court said, at page 434:

"The ascertainment of that value is not controlled by artificial rules. It is not a matter of formulas, but there must be a reasonable judgment, having its basis in a proper consideration of all relevant facts. * * *."

The court further said, on page 452:

"* * * The cost-of-reproduction method is of service in ascertaining the present value of the plant, when it is reasonably applied and when the cost of reproducing the property may be ascertained with a proper degree of certainty. * * *."

In *Missouri ex rel. S. W. Bell T. Co. v. Public Serv. Comm.,* 262 U. S. 276, the court said at page 287:

"It is impossible to ascertain what will amount to a fair return upon properties devoted to public service without giving consideration to the cost of labor, supplies, etc., at the time the investigation is made. * * *."

In *Georgia Railway & Power Co. v. Railroad Comm.*, 262 U. S. 625, the court said, page 630:

> "The refusal of the commission and of the lower court to hold that, for rate-making purposes, the physical properties of a utility must be valued at the replacement cost, less depreciation, was clearly correct. * * *."

Citing *Minnesota Rate Cases*, 230 U. S. 352, 434; *Smyth v. Ames*, 169 U. S. 466, 546, 547; *Willcox v. Consolidated Gas Co.*, 212 U. S. 19.

In *Bluefield Water Works and Improvement Company v. Public Service Comm.*, 262 U. S. 679, the court held that reproduction cost at present prices cannot be ignored in fixing rates for a public utility established before the war.

In *McCardle v. Indianapolis Water Co.*, 272 U. S. 400, 410-411, the court said:

> "It is well established that values of utility properties fluctuate, and that owners must bear the decline and are entitled to the increase. The decision of this court in Smyth v. Ames, 169 U. S. 466, 547, 42 L. ed. 819, 849, 18 Sup. Ct. Rep. 418, declares that to ascertain values 'the present as compared with the original cost of construction' is, among other things, matters for consideration. But this does not mean that the original cost or the present cost or some figure arbitrarily chosen between these two is to be taken as the measure. The weight to be given to such cost figures and other items or classes of evidence is to be determined in the light of the facts of the case in hand. By far the greater part of the company's land and plant was acquired and constructed long before the war. The present value of the land is much greater than its cost; and the present cost of construction of those parts of the plant is much more than their reasonable original cost. In fact, prices and values have so changed that the amount paid for land in the early years of the enter-

prise and the cost of plant elements constructed prior to the great rise of prices due to the war do not constitute any real indication of their value at the present time. Standard Oil Co. v. Southern P. Co. 268 U. S. 146, 157, 69 L. ed. 890, 895, 45 Sup. Ct. Rep. 465; Georgia R. & Power Co. v. Railroad Commission, 262 U. S. 625, 630, 631, 67 L. ed. 1144, 1147, 1148, 43 Sup. Ct. Rep. 680; Bluefield Waterworks & Improv. Co. v. Public Serv. Commission, 262 U. S. 691, 692, 67 L. ed. 1182, 1183, 43 Sup. Ct. Rep. 675; Missouri ex rel. Southwestern Bell Teleph. Co. v. Public Serv. Commission, supra, 287 (67 L. ed. 984, 31 A.L.R. 807, 43 Sup. Ct. Rep. 544). Undoubtedly, the reasonable cost of a system of waterworks, well planned and efficient for the public service, is good evidence of its value at the time of construction. And such actual cost will continue fairly well to measure the amount to be attributed to the physical elements of the property so long as no change in the level of applicable prices. And, as indicated by the report of the commission, it is true that, if the tendency or trend of prices is not definitely upward or downward and it does not appear probable that there will be a substantial change of prices, then the present value of lands plus the present cost of constructing the plant, less depreciation, if any, is a fair measure of the value of the physical elements of the property. * * *."

In *St. Louis & O'Fallon R. Co. v. United States*, 73 L. ed. 798, 49 Sup. Ct. Rep. 384, 279 U. S. 461, the court said, at pages 484-485:

"'The elements of value recognized by the law of the land for rate-making purposes' have been pointed out many times by this Court. Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; Willcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 48 L.R.A. (N. S.) 1134, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 57 L. ed. 1511, 48 L.R.A. (N. S.)

1151, 33 Sup. Ct. Rep. 729, Ann. Cas. 1916A, 18; Missouri ex rel. Southwestern Bell Teleph. Co. v. Public Serv. Commission, 262 U. S. 276, 67 L. ed. 981, 31 A.L.R. 807, 43 Sup. Ct. Rep. 544; Bluefield Waterworks & Improv. Co. v. Public Serv. Commission, 262 U. S. 679, 67 L. ed. 1176, 43 Sup. Ct. Rep. 675; McCardle v. Indianapolis Water Co. 272 U. S. 400, 71 L. ed. 316, 47 Sup. Ct. Rep. 144. Among them is the present cost of construction or reproduction.

"Thirty years ago, Smyth v. Ames, supra, announced (169 U. S. 546, 42 L. ed. 849, 18 Sup. Ct. Rep. 418):

" 'We hold, however, that the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public. And in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth.'

"In Missouri ex rel. Southwestern Bell Teleph. Co. v. Public Serv. Commission, supra (262 U. S. 287, 67 L. ed. 984, 31 A.L.R. 807, 43 Sup. Ct. Rep. 544), we said: 'It is impossible to ascertain what will amount to a fair return upon properties devoted to public service without giving consideration to the cost of

labor, supplies, etc., at the time the investigation is made. An honest and intelligent forecast of probable future values made upon a view of all the relevant circumstances is essential. If the highly important element of present costs is wholly disregarded such a forecast becomes impossible. Estimates for to-morrow cannot ignore price of to-day.' "

Other cases involving value of public utility properties decided during the period covered by the foregoing decisions are:

Denver v. Denver Union Water Co., 246 U. S. 178, 191;
Newton v. Consolidated Gas Co., 258 U. S. 165, 176;
Galveston Electric Co. v. Galveston, 258 U. S. 388;
Lincoln Gas & Electric L. Co. v. Lincoln, 250 U. S. 256.

It will be noted from the foregoing decisions that the United States Supreme Court, while holding that cost of reproduction new must be accorded weight in a valuation proceeding, has never held that cost of reproduction new is the sole element to be considered in a valuation case, or that cost of reproduction new must, in every case, be given dominant weight. It is particularly significant to note that the decision in *Smyth v. Ames, supra,* is still the law of the land, as was expressly held in the *O'Fallon* case. It follows therefore that while cost of reproduction new must be given consideration, as was said in *Smyth v. Ames, supra,* there may be other matters to be considered in fixing the value of public utility property.

It is, of course, fundamental that a public utility is entitled to receive a fair return upon the fair value of its property at the time it is being used for the public. *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 41. The problem presented in each case is that of determining the fair value of the property considering all the facts and circumstances

surrounding such property. We must never lose sight of the fact that value is the thing to be found, and that the ascertainment of value is not controlled by artificial rules. As the court in *Standard Oil Co. v. Southern Pacific Co.*, 268 U. S. 146, 156, said:

> "It is to be borne in mind that value is the thing to be found, and that neither cost of reproduction new, nor that less depreciation, is the measure or sole guide. The ascertainment of value is not controlled by artificial rules. It is not a matter of formulas, but there must be a reasonable judgment having its basis in a proper consideration of all relevant facts. * * *."

In speaking of the ascertainment of value in a utility rate case, the Special Master in *Brooklyn Borough Gas Co. v. Prendergast*, 16 F. (2d) 615, said, page 624:

> "There is not the same clarity or uniformity of expression as to how the present value is to be ascertained. No fixed formula has been prescribed by the Supreme Court. Indeed, that court has expressly ruled that it is not a matter of formula or of fixed rules. That court has never gone so far as to say that reproduction cost new is the only element to be considered. Nor, on the other hand, has it ever selected any particular method as the one and only decisive means of calculating value."

In the case at bar the Railroad Commission carefully considered cost of reproduction new, but arrived at the conclusion that, in view of the unusual conditions prevailing in the city of Washburn, cost of reproduction new did not reflect the true value of the utility property. The Commission was not compelled to give dominant weight to cost of reproduction new, as is shown by the decision in *Georgia Ry. & Power Co. v. Railroad Comm.*, 262 U. S. 625, where the court said, pages 629-630:

"Here the Commission gave careful consideration to the cost of reproduction, but it refused to adopt reproduction cost as the measure of value. It declared that the exercise of a reasonable judgment as to the present 'fair value' required some consideration of reproduction costs as well as of original costs, but that 'present fair value' is not synonymous with 'present replacement cost,' particularly under abnormal conditions. That part of the rule which declares the utility entitled to the benefit of increases in the value of property was, however, specifically applied in the allowance of $125,000, made by the Commission to represent the appreciation in the value of the land owned. The lower court recognized that it must exercise an independent judgment in passing upon the evidence; and it gave careful consideration to replacement cost. But it likewise held that, there was no rule which required that in valuing the physical property, there must be 'slavish adherence to cost of reproduction, less depreciation.' It discussed the fact that, since 1914, large sums had been expended annually on the plant; that part of this additional construction had been done at prices higher than those which prevailed at the time of the rate hearing; and it concluded that, 'averaging results and remembering that values are . . . matters of opinion, . . . no constitutional wrong clearly appears.'"

II. Evidence of economic conditions in the community where a utility is located may be considered in fixing the value of the public utility property.

We premise our argument that economic conditions in the community where a public utility is located is relevant upon the proposition that all elements which in any way affect value may properly be considered in fixing the value of public utility property. Undoubtedly, in the typical case where the community is experiencing a healthy and steady growth, cost of reproduction new less deprecia-

tion should be given major consideration. It is our position, however, that in a city like Washburn, where the population is steadily diminishing, where property values are declining, where tax delinquencies are relatively enormous, cost of reproduction new does not and cannot reflect true value of the utility property located therein.

The lower court proceeded upon the theory that evidence of economic conditions was relevant in a rate proceeding. It overruled the motion made by the utility to strike out Paragraph XXIV of the answer in which it is alleged that the city of Washburn is in a decadent condition; that real estate values have declined to a mere fraction of former values; that the tax delinquencies in the city are enormous; that the value of the Washburn Water Works property has been affected by this condition (R. 10, 86). Furthermore, the lower court allowed the appellants to introduce evidence sustaining the allegations contained in Paragraph XXIV of the answer, over the objections of the utility (R. 120-121, 139, 144-145, 146-147, 148-149, 150, 151-152).

These rulings of the lower court were clearly correct. The cost-of-reproduction principle is based upon the proposition that "If the property, which legally enters into the consideration of the question of rates, has increased in value since it was acquired, the company is entitled to the benefit of that increase."

> *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 41; *Bluefield W. W. & Imp. Co. v. Public Service Commission*, 262 U. S. 679, 690.

> "It is well established that values of utility properties fluctuate, and that owners must bear the decline and are entitled to the increase."

> *McCardle v. Indianapolis Water Co.*, 272 U. S. 400, 410.

Upon the cost of reproduction principle there has been engrafted a limitation to the effect that the utility cannot claim an increase in value beyond property values generally in the community where the utility is located. In *Minnesota Rate Cases*, 230 U. S. 352, 454, the court said:

> "And where the inquiry is as to the fair value of the property, in order to determine the reasonableness of the return allowed by the rate-making power, it is not admissible to attribute to the property owned by the carriers a speculative increment of value, over the amount invested and beyond the value of similar property owned by others, solely by reason of the fact that it is used in public service. That would be to disregard essential conditions of the public use, and to make the public use destructive of the public right."

In *Middlesex Water Co. v. Board of Public Utility Commrs.*, 10 F. (2d) 519, the special master whose report was affirmed by the court said, page 522:

> "Also, it is the duty of a legislative body, the defendant board, and this court (Minnesota Rate Cases, 230 U. S. 352, 455) to recognize that a utility company is entitled to a reasonable measure in the general prosperity of the communities which it serves, still it is said the increase so allowed cannot properly extend beyond the normal market value of land in the vicinity having a similar character."

As we shall hereafter show, property values in the city of Washburn have declined to a fraction of their former value. This condition is the result of a process of decay obtaining in the city, the population of which has been steadily declining for a number of years. Other property in the city does not have a value commensurate with cost of reproduction new. It must inevitably follow, as the Railroad Commission pointed out in its order (R. 48-49),

that the value of the Washburn Water Works utility property has been adversely affected by the decline of general property values in the city. The utility clearly is not entitled to value of its property in excess of values of other similar property in the city. It follows, therefore, that evidence of property value generally in the city of Washburn is entitled to great weight in the case at bar.

We have, in this case, direct evidence to the effect that the value of the Washburn Water Works property has been adversely affected by the retrogressive condition of the city of Washburn. We refer to the fact that the Washburn Water Works Company is, at the present time, operating under a receiver. There is no claim made by any of the parties to this suit that the utility has been, in the past, negligently or extravagantly operated (except in regard to the installation of meters and the installation of a smaller electrical pump, which will be commented upon later). Why then is the company in the hands of a receiver? Counsel will attempt to answer this question by saying that the receivership resulted through the failure of the Railroad Commission to fix adequate rates. The fact remains, however, that, between 1910 and 1921, the utility did not make application to the Commission for an increase in rates (R. 139). Furthermore, the rates heretofore charged by the Washburn Water Works Company are among the highest in the state of Wisconsin (R. 39). It it obvious that the receivership resulted because of the decay of the city.

The weight to be given to the various elements which affect value "is to be determined in the light of the facts of the case in hand." *McCardle v. Indianapolis Water Co.*, 272 U. S. 400. In the cases formerly before the supreme court, land values had increased tremendously. In *McCardle v. Indianapolis Water Co.*, 272 U. S. 400, 410-411, it appeared that

> "By far the greater part of the company's land and plant was acquired and constructed long before the war. The present value of the land is much greater than its cost; and the present cost of construction of those parts of the plant is much more than their reasonable original cost. In fact, prices and values have so changed that the amount paid for land in the early years of the enterprise and the cost of the plant elements constructed prior to the great rise of prices due to the war do not constitute any real indication of their value at the present time."

Washburn, in common with the majority of communities in the United States, experienced a boom period during the war. Property values in the city during this period increased from two hundred fifty to one thousand percent (R. 116). Unlike many cities, however, values after the war suffered a great decline (R. 116-117). In these circumstances, it is clear that the value of the utility property was much greater during the war period, than it is at the present time. To illustrate the decline in values, we call the court's attention to the fact that in the year 1890 the utility purchased some real estate, paying therefor the sum of $1,000.00 (R .147). The utility has other real estate, used and useful in its public utility business. Yet the total value of the real estate of the utility, as of February 1, 1929, according to the figures of Mr. Hartt, the engineer employed by the utility to make a valuation of the utility property, is $275 (R. 114). It thus appears that the condition as to land values obtaining in the city of Washburn is exactly the reverse of that obtaining in the *McCardle* case, 272 U. S. 400.

The situation in regard to property values in the city of Washburn is clearly shown in the affidavit of W. G. Maxcy, the receiver of the Washburn Water Works Company. According to his affidavit, property values in the

city of Washburn in 1928 were practically the same as they were in 1914 and 1915 (R. 152). To say that the utility property should be valued upon the basis of 1928 prices in a community where 1914 values prevailed is to exalt the letter of the valuation principle above its spirit. If evidence as to property values generally has no bearing in a rate case, there cannot be any real inquiry as to the true value of utility property. We do not believe that this court will ever hold that the value of utility property must be computed strictly according to rigid formulas without any regard to actual value.

Our position may best be illustrated by a hypothetical situation. Suppose during the recent oil boom in Michigan, a city of 5,000 inhabitants springs up over night. A water utility is brought into being, and constructs a plant sufficient in size to accommodate all the inhabitants. At the end of a year, the boom collapses, and the population is reduced to 500 people. In such case, can it be said that after the boom the utility property has a value approximating cost of reproduction new? Shall the 500 inhabitants be required to pay rates sufficient to produce a reasonable rate of return on a value based on cost of reproduction new? We have no doubt this court would answer these questions in the negative. The same condition exists in Washburn. The present plant was large enough to accommodate the increased population during the war; it was large enough to accommodate a population of 3,707 in 1920. Yet the utility now contends that it is entitled to the same return for serving a population of 2700 as it was when it served a population of 3700.

III. Order of the Commission fixing value of $75,000.00 is supported by the evidence.

The question as to whether the order of the Commis-

sion fixing a value of $75,000 for rate-making purposes is supported by the evidence necessarily involves the further question as to whether the Commission accorded proper weight to cost of reproduction new, less depreciation. The Commission, in its order, found that the value of the utility property based upon cost of reproduction new was $114,089, depreciated $87,116 (R. 48). The depreciated value does not include working capital materials and supplies. With these elements added, the depreciated value, as found by the Commission, is $89,616 (R. 154). At the trial, appellants introduced evidence showing a value based on cost of reproduction new, as of January 1, 1929, of $121,617, depreciated $93,364 (R. 124), exclusive of working capital, materials and supplies. The depreciated value, including these items, is $95,864 (R. 122, 124). The utility contends that the value of the utility property, as of February 1, 1929, based on cost of reproduction new was $138,537, depreciated $117,952 (R. 114). In view of the wide spread between the values computed by the utility and the commission, we shall first direct our attention to the question of value based on cost of reproduction new. The solution of this question is of utmost importance in the case at bar. If it appears, as we contend, that the depreciated value of $89,616 correctly reflects value based on cost of reproduction new, the difference between the value of $75,000 fixed by the order, and the value of $89,616 based on cost of reproduction new, amounts to $14,616. The appellants contend that the evidence supports the reduced value of $75,000; that such value comports with the value of similar property located in the city of Washburn.

1. *Value of* $89,616 *based on cost of reproduction new is not unreasonable.*

The difference between the values based upon cost of

reproduction new as determined by the utility and the commission relates primarily to a difference in prices of the various items included in a water plant, and a dispute over the depreciation. The inventory used by the utility and the commission is practically identical (R. 109).

To substantiate the prices used by the commission, the appellants introduced a graph and supporting data showing prices of cast iron pipe, extending over a period of several years (R. 128-138). Reference to the graph will disclose that the Railroad Commission used proper prices for six inch cast iron pipe, one of the major items of a water plant.

Pursuant to stipulation (R. 102) the issues in the case were tried on affidavits. There was, therefore, no cross-examination of Mr. Hartt, the utility's engineer, nor of Mr. Thiessen, the commission's engineer, as to the method adopted by them in arriving at unit prices used in their respective valuations.

The difference between the valuation of $89,616, and the valuation of $95,864, as of January 1, 1929 (both valuations having been made by the commission) is due almost entirely to an increase in the price of cast iron pipe. Mr. Thiessen, who made the valuation for the commission, testified in his affidavit that on January 1, 1928, the price for six inch cast iron pipe at the trench ready to lay was $40.40 per ton, while on January 1, 1929, the price had advanced to $49.35 per ton (R. 123).

The difference between the values as fixed by the Commission and as computed by the utility is caused in part by the item of depreciation. Mr. Thiessen, the commission's engineer, expressly states in his affidavit that he arrived at the per cent condition of cast iron pipe "upon the basis of probable deteriorati and reduced carrying capacity, resting upon samples, tests, observation and gen-

eral experience of pipes under conditions in the Lake Superior District as well as elsewhere in Wisconsin. The arbitrary method known as the four per cent sinking fund method of determining the per cent condition has not been used. The per cent condition ascribed to each item of the inventory is intended to reflect true present physical condition to the best of our knowledge and belief" (R. 122).

Mr. Hartt, the engineer employed by the utility, testified in regard to depreciation as follows (R. 110):

> "From personal knowledge of this affiant with the practice of utility companies generally, this affiant is of the opinion that the four per cent sinking fund method is a proper method of reflecting the actual results of depreciation of property for the reason that the fund established for such purposes is in practice invariably invested in the property of such company or in securities netting the company a sum equal to or in excess of four per cent and therefore by the use of such four per cent sinking fund method the result obtained reflects the actual practice in the business and the accepted method of supplying the depreciation fund, while the straight line method presupposes that no investment of such fund is made, which is contrary to the practice."

Mr. Hartt also states in his affidavit (R. 110) that in arriving at the depreciated value of the utility property, he took into consideration his knowledge of the general effect of Lake Superior water upon the mains, that such water does not scale the pipes, as disclosed by inspection of mains at Superior and Ashland that have been in use over thirty years without showing any visible sign of deterioration on the inside of the pipe, and that he also inspected various other elements of the plant, and some of the mains that had been cut.

While Mr. Hartt testifies that he figured depreciation

by inspecting the property, it is nevertheless apparent that he considers the four per cent sinking fund method the proper method of figuring depreciation. Mr. Hartt's views concerning the four per cent sinking fund method of computing depreciation do not coincide with the decisions of this court. In determining depreciation "The testimony of competent valuation engineers who examined the property and made estimates in respect of its condition is to be preferred to mere calculations based on averages and assumed probabilities." *McCardle v. Indianapolis Water Co.*, 272 U. S. 400, 416; *Pacific Gas & E. Co. v. San Francisco*, 265 U. S. 403, 406; *Standard Oil Co. v. Southern Pacific Co.*, 268 U. S. 146, 159. To the extent that depreciation is figured by Mr. Hartt on a sinking fund basis, it must be rejected.

We suggest to the court that the differences between the valuations made by the Commission, and the valuation made by the utility may be ascribed to a desire on the part of the utility to establish for rate-making purposes the highest possible value which may be given to the property, on a cost of reproduction basis. The court has never held that a value fixed by an administrative board or tribunal must be the highest value which can possibly be arrived at. In *McCardle v. Indianapolis Water Co.*, 272 U. S. 400, the court held that under the evidence in the case the value of the utility property was not less than $19,000,000, notwithstanding that there were three valuations made on the basis of spot prices ranging from $19,500,000 to $22,669,000 (p. 418). The value thus held by the court to be the minimum for rate making purposes was $500,000 less than the lowest figure computed on the basis of cost of reproduction new.

The difference between the values contended for the utility, and those contended for by the commission is attributable to some extent to the fact that spot prices vary. For example, the graph introduced by the appellants showing prices of cast iron pipe (R. 128), indicates that the

value of a utility, and particularly a water utility, depends upon the particular date of the value inquiry. The graph shows that the prices of cast iron pipe had declined greatly on January 1, 1928, and that subsequently the prices made a partial recovery. We do not believe that the order of the commission fixing a value of $89,616 is unreasonable, when fluctuations in prices are considered.

It must not be forgotten that an order of the commission is presumed to be reasonable. In *Minnesota Rate Cases,* 230 U. S. 352, the court said, pages 452-453:

> "It is fundamental that the judicial power to declare legislative action invalid upon constitutional grounds is to be exercised only in clear cases. The constitutional invalidity must be manifest, and if it rests upon disputed questions of fact, the invalidating facts must be proved. And this is true of asserted value as of other facts."

Under the evidence in the case at bar we submit that the fair value of the utility property for rate-making purposes does not exceed the sum of $89,616.00.

The appellants introduced in evidence the valuation made by the Commission as of January 1, 1929, for the purpose of showing that prices of the items entering into a utility have not as yet become stable. The mere fact that prices on January 1, 1929 were higher than they were at the time of the investigation by the Commission does not indicate that the order fixing a value of $87,616.00, exclusive of materials and supplies and working capital, is unreasonably low. The graph introduced by the appellants (R. 128) shows that the prices of cast-iron pipe fluctuate greatly from month to month. The prices of other materials entering into a water plant likewise fluctuate. The Commission is entitled to exercise a reasonable amount of discretion in estimating prices for the future

and, in the absence of a clear abuse of discretion, the determination of the Commission ought to be final.

A. Going value.

In fixing the value of $89.616.00 based on cost of reproduction new, the Railroad Commission did not make any allowance for going value (R. 49, 154), nor do we believe that any allowance should be made for going value.

The United States Supreme Court has laid down the following rule with respect to going value:

> "That there is an element of value in an assembled plant doing business and earning money over one not thus advanced, is self-evident. This element of value is a property right, and should be considered in determining the value of the property upon which the owner has a right to make a fair return when the same is privately owned, although dedicated to public use."
>
> *McCardle v. Indianapolis Water Co.*, 272 U. S. 400, 416;
>
> *Denver v. Denver Union Water Co.*, 246 U. S. 178, 191, 192;
>
> *Des Moines Gas Co. v. Des Moines*, 238 U. S. 153, 165.

In the *McCardle* case, *supra*, the court cited the language used by the Railroad Commission as follows, page 414:

> "Any reasonable man with a knowledge of this property and the local conditions would unhesitatingly affirm that it had a value far in excess of the value of the pipe, buildings, grounds and machinery. Consider its earning power with low rates, the business it has attached, its fine public relations, its credit, the nature of the city and the certainty of large future growth, the way the property is planned and is being extended with the future needs of the city in view, its

operating efficiency and standard of maintenance, its desirability as compared with similar properties in other cities and with other utilities of comparable size in this city. These things make up an element of value that is actual and not speculative. It would be considered by a buyer or seller of the property or by a buyer or seller of its securities."

In *People ex rel. Kings County Lighting Co. v. Willcox,* 210 N. Y. 479, 104 N. E. 911, 912-913, the court said:

> "The company starts out with the 'bare bones' of the plant, to borrow Mr. Justice Lurton's phrase in the *Omaha Water Works Case* (218 U. S. 180, 30 S. Ct. 615, 54 Law Ed. 991, 48 L.R.A. (N. S.) 1084), *supra.* By the expenditure of time, labor and money, it coordinates those bones into an efficient working organism and acquires a paying business. The proper and reasonable cost of doing that, whether included in operating expenses or not, is as much a part of the investment of the company as the cost of the physical property. * * *."

In *New York Telephone Co. v. Prendergast,* 300 Fed. 822, 826, the court said:

> "It is found that this plaintiff was created, and does function, and functions very well; therefore, it has going value, because it goes well. The amount may be difficult of ascertainment, but that going value exists is self-evident."

It will be noted that the basis of the principle providing an allowance for going value is that the business is in fact a going business making money. In the *McCardle* case, *supra,* as well as in the other decisions cited, this fact clearly appears. It is clear from the evidence in this case that the Washburn Water Works Company is not in

fact a going concern as that term has been used in cases holding that allowance must be made for going value.

In *New York & Richmond Gas Co. v. Prendergast*, 10 F. (2d) 167, 177, the Special Master, in speaking of going value, said, pages 177-178:

> "Going value may, in my opinion, be defined as the difference between what a prospective purchaser would pay for a fully completed and equipped plant ready to operate, but which in fact had never operated, and one fully completed and equipped which was actually operating, with an established business, as a going concern. * * *."

The special master further said, page 179:

> "I am impressed, however, with the fact that there is not, and cannot be, any mathematical formula or method for computing the amount and present worth of going value. In the absence of demonstration through an actual purchase and sale transaction, under fair conditions, its ascertainment must be a matter of competent business judgment as to what a purchaser would be willing to pay for such elements and properties, rather than undergo the costs of acquiring them anew. * * *."

If we assume that going value is that sum which a buyer would consider in acquiring utility property, we submit that there is no element of going value attached to the property of the Washburn Water Works Company. It is neither a going concern nor a money-making concern as that term is used in the decisions. The rates in Washburn, without the increase applied for by the utility, are among the highest in the state of Wisconsin, and yet the utility concedes that it cannot be operated profitably. In fact, the company's record of water consumers, considered in conjunction with the shrinkage of population in the city, dem-

onstrates conclusively that the business of the utility has been diminishing and will continue to diminish in the future. Considering all the facts and circumstances surrounding the utility property in Washburn, the conclusion is irresistible that a prospective purchaser of a utility property would make no allowance for going value.

2. *Commission accorded proper weight to cost of reproduction new.*

In the preceding section of this brief we have called the court's attention to the fact that the Railroad Commission fixed a value of $75,000 for the utility property of the Washburn Water Works Company, notwithstanding the finding of a value of $89,616 based on cost of reproduction new. It is our contention that the evidence in the record was sufficient to justify the Commission in finding a value of $75,000.

A. Property values in the city of Washburn are very low.

It must be borne in mind that the city of Washburn was formerly a "sawmill town" (R. 116-117). Mr. Peavy, who in the past was mayor of the city, testified in a hearing held before the commission in 1923 that he had lived in the city of Washburn since the spring of 1910; that when he first came to the city the industries were equally divided between lumbering and the production of powder by the DuPont Company, at its plant located in the town of Barksdale, four miles southeast of the city (R. 116). He testified that there are now no sawmills in the city, but that there was a box factory which employed between 70 and 80 people (R. 117).

Mr. Robinson, who is a publisher, and who has resided in the city of Washburn for thirty-five years, testified in his affidavit that at the present time there are no industries in the city of Washburn except an excelsior factory which employs about twenty-five people, and a coal dock which employs on the average about fifteen men (R. 148). He further testified that the DuPont powder plant employed about three hundred men, two hundred of whom are residents of the city of Washburn (R. 148-149).

In view of the industrial condition of the city, it is natural to suppose that property values would be very low. Such is the situation which actually obtains. Mr. Peavy testified that prices of property increased during the war; that in 1920 prices began to drop; that in 1920 and 1921 the city was visited by numerous disastrous fires; that in 1921 and 1922 there were numerous mortgage foreclosures; that during the past twelve months (that is, prior to 1923) he did not know of a single bona fide sale of property in the city; that at mortgage foreclosure sales the only party bidding was the mortgagee; that in his opinion property values in the city were reduced to practically nothing (R. 116-117). He further testified that property values were lower than the assessed value (R. 116-117), and that in his judgment not five per cent of the property in Washburn could be sold for cash on the basis of assessed value (R. 117).

The situation with respect to property values generally is not confined to any particular part of the city. Bayfield street is the chief and only improved business street in the city, and is the only paved street in Washburn (R. 146). It is logical to suppose that the property abutting on this street would be the most valuable in the city, and yet the evidence discloses a tremendous number of vacant lots along the street (R. 146). The only explanation of these

vacancies is that the property has no value. Since property on the principal thoroughfare has but slight value, we must conclude that the remainder of the property in the city has a correspondingly low value.

A positive indication of decline in values may be found in the tax situation in the city. The map introduced by the appellants, in connection with the affidavits marked Exhibits CC and DD (R. 150-151) shows that taxes are delinquent on a very large part of the property in Washburn. The map shows in red property acquired by Bayfield county through tax deeds (R. 150), and shows in green the property upon which the taxes are delinquent for one or more years (R. 151). This map has not been printed, but was sent up to this court for inspection (R. 157-158). No argument is necessary in order to demonstrate that property upon which taxes are delinquent has no substantial value.

Probably no clearer illustration of the decline in value is afforded than that disclosed by a comparison of the value of a portion of the real estate now owned by the utility at the time it was purchased in 1890, and the present value of all the real estate owned by the utility. In 1890 a parcel of real estate was purchased by the utility for $1000.00 (R. 147). The utility now owns this parcel, together with additional land, and yet the value placed on all of the land now owned by the utility by Mr. Hartt, the engineer employed by the utility to make a valuation, is $275.00 (R. 114). The decline in value of the land owned by the utility is typical of the decline of land values generally throughout the city.

A further illustration of decline in value is found in the affidavit of W. G. Maxcy, the receiver of the Washburn Water Works Company, which was introduced by counsel representing the utility (R. 152-153). This affidavit shows that the true value of all the property in the city of Wash-

burn in 1914 was $1,241,223, and in the year 1928 amounted to $1,342,480 an increase of approximately $100,000 in this period. The affidavits further shows that the 1915 true value was $1,295,776, and the 1916 true value $1,518,638. The 1928 value exceeds the 1915 value by approximately $47,000 while the 1916 value is in excess of the 1928 value by approximately $175,000. It thus conclusively appears that property values in the city are substantially the same as they were in 1914 and 1915.

The greater portion of the utility property was constructed prior to the increase of prices during the war (R. 10). If Washburn were a normal community the utility would be entitled to a value reflecting 1928 prices. Property values generally, however, are practically identical with 1914 and 1915 values. In these circumstances, can it be said that the utility is entitled to have a value placed upon its property, based on cost of reproduction new? If this question must be answered in the affirmative, it must inevitably follow that in a rate proceeding actual value is immaterial, and that a figure representing cost of reproduction new must be taken as the measure of value. If such be the rule, *Smyth v. Ames*, 169 U. S. 466, is no longer the law.

We call the court's attention to the fact that the $75,000 value fixed by the Commission is in excess of values computed on the basis of 1914 and 1915 prices. The Commission found a split inventory value of $71,530.00 for the utility property (R. 49). It is apparent that the Commission in establishing a value of $75,000 has ascribed a value to the utility property in excess of values of similar property in the city.

B. Shrinkage of population.

A factor vitally affecting the value of the Washburn Water Works property is shrinkage of population in the

city. The population of the city of Washburn for the years 1905, 1910, and 1920, as disclosed by the affidavit of Thiessen, introduced by the appellants, was as follows (R. 139):

1905	4,924
1910	3,830
1920	3,707

Rev. Borucki, a Catholic priest in charge of the only Catholic congregation in the city of Washburn, testified in the affidavit introduced by the appellants that he has had charge of the Washburn congregation continuously since 1919; that according to the records of the church there were 1,265 members in the year 1917; that since 1919 there has been a constant and continuous decline in the membership of the church; that the membership of the church in 1928 was 544; that the cause of the shrinkage in membership was caused by the members moving out of Washburn to other localities (R. 144).

Rev. Christiansen testified in the affidavit introduced by the appellants that he is the pastor of the only Norwegian Evangelical Lutheran church in the city of Washburn, and that he has been in charge of the congregation for 22 years; that in the last six or seven years there has been a very substantial shrinkage in the number of members of his congregation; that from the best information available it appears there were 435 members in said congregation in 1914, and that at the present time the membership numbers 245; that said decrease in membership is due to shrinkage in the population of the city and is substantially in proportion to such shrinkage (R. 145).

V. E. Kimball, testified in the affidavit introduced by the appellants that he is the city superintendent of the public schools in the city of Washburn, and has been such for several years last past; that there are four public

schools in the city, and that there are no private or parochial schools teaching general subjects of education in the city; that the school census reports for the year 1924 show that there were 1,252 children of school age in the city, but that he believes the report to be incorrect, and that in his opinion in 1924 there were more children of school age than said census shows; that the 1927 census shows 1,033 children of school age in the city; that the census report for the year 1928 shows 986 children of school age in the city; that he believes there has been a constant and rapid reduction in the number of children of school age in the city of Washburn since the years 1922 and 1923 (R. 149-150).

W. A. Robinson testified in the affidavit introduced by the appellants that he has been a resident of the city of Washburn continuously for more than thirty-five years; that he is the editor and publisher of a weekly paper which has been circulated in Washburn for thirty-five years; that he is familiar with the affairs of the city and has personal acquaintance with practically every resident of the city; that some time in the year 1928 for the purpose of ascertaining whether the circulation of his paper was as great as it should be, he carefully estimated and checked over the population of the city and came to the conclusion that the population was about 2,700, and that the population has been shrinking regularly and continuously for the past six years or more, and that such shrinkage still continues (R. 148-149).

It thus conclusively appears that the population of the city in 1928 was approximately 2200 less than in 1905, and approximately 1000 less than in 1920. This shrinkage of population proves beyond all cavil that the city of Washburn is in a retrogressive condition. Such a condition inevitably affects property values in the city.

The shrinkage of population is reflected to some extent in the record of consumers of the utility. The records of the company show that in 1924 there were 588 customers, in 1925, 558 customers, in 1926, 585 customers, in 1927, 525 customers, and in 1928, 537 customers. It is true that, according to the records of the company, there were more customers in 1928 than in 1927. It will be noted, however, that the number of customers has decreased sharply since 1926, and that such decrease will continue.

C. Scarcity of industries in the city.

Undoubtedly the economic condition of the city of Washburn is caused in part, at least, by a scarcity of industries in the city. It appears that the industries are limited to an excelsior factory which employs about twenty-five people, and a coal dock employing about fifteen men (R. 148). In addition, the Du Pont Powder plant, located in the town of Barksdale, employs about three hundred men, two hundred of whom live in the city of Washburn (R. 148). The industries enumerated constitute practically the only source of income for the city (R. 148-149).

It is a matter of common knowledge that no city with a population of 2700 can hope to progress with the industries we have enumerated. The industrial situation has played an important part in the decline of property values in the city.

D. Plant of the Washburn Water Works Company is larger than is presently required.

There can be no question but that the distribution system of the utility is larger than is required at the present time. To illustrate the present over-development, the appellants introduced a map and a number of photographs

showing the location of various hydrants in the city of Washburn (R. 120-121). Neither the map nor the photographs were printed in the transcript, but are now before the court for inspection (R. 157-159). The photographs were taken during the month of February, 1928, and the points photographed have been indicated on the map (R. 120-121).

We shall not comment on the individual photographs. Suffice it to say that they show various extensions of the distribution system into localities in the city where no customers now live. We do not contend that the construction of the plant was wasteful, extravagant or imprudent. Undoubtedly when these extensions were made the utility had good reason to believe that the city of Washburn would progress in the same manner as other communities have progressed. Experience has shown, however, that the city of Washburn is not a progressive city, but, on the contrary, has retrogressed greatly in the last few years.

If cost of reproduction new is applied strictly to the property owned by the Washburn Water Works Company, the customers of the utility will be obliged to pay rates based on the value of the entire plant, part of which is composed of a distribution system not presently used or useful. Such is not the rule.

> *San Diego Land & Town Co. v. Jasper,* 189 U. S. 439, 446, 447.

We confess that no exhaustive study was made either by the Commission or by counsel representing the appellants to show the extent of the over-development of the utility property.

The evidence does, however, disclose that the present plant was adequate to take care of the increased population during the war; that it was sufficient to take care of a

population of 3,707 in 1920 (R. 139); and that the present population of 2700 (R. 148) must support the utility.

E. Evidence as to conditions in the city of Washburn undisputed.

We suggest that the court in passing upon the question as to whether the Commission accorded proper weight to cost of reproduction new, and in passing upon the question as to whether the order of the Commission is supported by the evidence, should not lose sight of the fact that the evidence respecting the conditions prevailing in the city of Washburn is undisputed. The utility made no effort to contradict the evidence introduced by the appellants; in fact counsel for the utility offered in evidence the affidavit of the receiver containing the true value of the property in Washburn from 1914 to 1928, inclusive (R. 152), which shows that property values in the city in 1928 were substantially the same as they were in 1914 and 1915.

If the court is of the opinion that evidence of the economic conditions in Washburn is relevant in a rate proceeding, we do not believe the order of the commission fixing a value of $75,000 is open to attack.

3. *Rights of the public should be considered.*

The order of the Railroad Commission recites that the rates fixed for the Washburn Water Works Company property by its order of October, 1922, are among the highest in the state (R. 39). If the utility's request for an increase of rates sufficient to produce a return of 8% on a value of $122,952.00 is granted, the rates in Washburn will be the highest in the state. The result of such an increase in rates will directly burden greatly each of the 537 customers which the utility now has. If the population continues to

diminish and the number of consumers becomes smaller, the burden of paying rates sufficient to produce a return of 8% on the value contended for by the utility will be destructive of private property in the city.

It seems to be well settled that a utility is not entitled to a rate base which will be destructive of property in the municipality.

In *Covington, etc. Turnpike Road Co. v. Sandford,* 164 U. S. 578, the court said, page 596:

> "* * * It cannot be said that a corporation is entitled, as of right, and without reference to the interests of the public, to realize a given per cent upon its capital stock. When the question arises whether the legislature has exceeded its constitutional power in prescribing rates to be charged by a corporation controlling a public highway, stockholders are not the only persons whose rights or interests are to be considered. The rights of the public are not to be ignored. It is alleged here that the rates prescribed are unreasonable and unjust to the company and its stockholders. But that involves an inquiry as to what is reasonable and just for the public. * * * The public cannot properly be subjected to unreasonable rates in order simply that stockholders may earn dividends. * * *."

In *San Diego Land and Town Co. v. Jasper,* 189 U. S. 439, the court, in considering the reasonableness of water rates, said, pages 446-447:

> "* * * If a plant is built, as probably this was, for a larger area than it finds itself able to supply, or, apart from that, if it does not, as yet, have the customers contemplated, neither justice nor the Constitution requires that, say, two-thirds of the contemplated number should pay a full return. * * *
>
> "* * * The statute of California no doubt was contemplating the case of waterworks fully occupied within the area which they intended to supply. It hardly

> can have meant that a system constructed for six thousand acres should have a full return upon its value from five hundred, if those were all that it supplied. At all events we will not be the first to say so. * * *."

In the dissenting opinion of Judge Evans in *Ashland Water Co. v. Railroad Comm.*, 7 F. (2d) 924, it was said, page 943:

> "And if these results be not sufficiently startling in their nature, let the possibility of future depopulation of Ashland be considered. If the depopulation which has been going on for 30 years increase—if one-half of the present population should leave—the rates would be enormously increased. And if the rule be an unvarying one, we can continue the speculation until a condition would exist where the utility actually drove the citizens from the city."

We submit that, in the case at bar, the rights of the citizens of Washburn should be considered in determining the value to be used for rate-making purposes. At the present rate of depopulation, the burden of paying water rates will become more and more onerous. We do not believe that a rule fixing values should be so arbitrarily applied as to confiscate property in the city nor do we believe that the utility is constitutionally entitled to a value which will accomplish such result.

IV. Rates fixed by order of the Commission not confiscatory.

In the order of December 4, 1928, the Railroad Commission provided rates which would, in the judgment of the commission, provide for a return of 7 per cent upon a value of $75,000 (R. 52). The lower court was of the opinion that the value of $75,000 placed on the utility property by the Commission was not supported by the evidence (R. 92), and it was therefore not necessary for

it to pass upon the question as to whether the return provided by the order was unreasonable.

The utility contends that the rates fixed by the order are confiscatory, even though it be assumed that the rate base of $75,000 is proper. The Commission estimated that the 1928 operating expenses of the utility, exclusive of depreciation expense, taxes, interest and return would amount to $8,188. The actual operating expenses of the utility for 1928 according to the evidence introduced by the utility amounted to $11,003 (R. 108), and according to the audit made by the commission, amounted to $11,143.30 (R. 119), both figures excluding depreciation, taxes and return.

The Commission in estimating operating expenses rejected actual pumping costs on the ground such costs are excessive, and that such costs may be materially reduced through the installation of a smaller electrical pump (R. 49). The Commission was likewise of the opinion that operating costs could be reduced through the installation of meters (R. 51). The Commission also rejected the item of legal expenses for the purpose of estimating future operating expenses (R. 51). We shall therefore inquire as to whether the Commission exceeded its jurisdiction in disregarding the foregoing items and, if not, whether a return of 7 per cent is confiscatory.

1. *Order makes proper provision for operating expenses.*

In approaching the question as to whether the Commission made proper allowance for operating expenses, we are not unmindful of the rule that an administrative body such as the Railroad Commission is not the financial

manager of the Washburn Water Company. The principle is firmly established that

> "The commission is not the financial manager of the corporation, and it has no power to substitute its judgment for that of the directors of the corporation; nor can it ignore items charged by the utility as operating expenses unless there is an abuse of discretion in that regard by the corporate officers."
>
> *State Public Utilities Commission v. Springfield Gas & E. Co.*, 291 Ill. 209, 234;
> *Missouri ex rel. Southwestern Bell T. Co. v. Public Service Comm.*, 262 U. S. 274, 289.

The rule is sometimes stated to be:

> "Neither the defendants (Public Service Commission) nor the court is charged with the management of the plant; neither may, in the absence of a showing of mismanagement, inefficiency or bad faith, substitute its judgment for that of the plaintiff's officers."
>
> *Brooklyn Borough Gas Co. v. Prendergast*, 16 F. (2d) 615.

The appellants contend that the Commission has not impinged upon the rights of the utility by a violation of the principles thus established, and take the position squarely that the utility, by reason of the retrogressive condition of the city of Washburn, is charged with maintaining a higher degree of operating efficiency than would be required were the plant located in a normal community.

A. Pumping costs for year 1928 were excessive.

In the order of December 4, 1928 the Commission said (R. 49):

> "We are of the opinion, from our investigation of

the operating conditions at Washburn, that a considerable additional saving in the cost of pumping could be brought about by the installation of an additional pump and smaller motor. With the 125 H.P. motor now in use, driving the 1,000 gallon per minute pump, the demand upon the power company has resulted in a rate for energy of about four cents per kilowatt hours. The installation of a smaller pump and motor would decrease the demand and increase the period of pumping correspondingly."

The schedule of rates charged by the Lake Superior District Power Company, from whom the utility purchases electrical current for pumping purposes (R. 125) shows that if the demand is reduced, power can be purchased at a lower rate. Mr. Thiessen, the Commission's engineer, in his affidavit (R. 143) said:

"At present the equipment consists of a motor driven centrifugal pump of a 1,000 gallon per minute rated capacity pumping three or four hours per day to a reservoir upon the hillside above the city. With the 125 H.P. motor driving this pump and the short period of operation, the demand upon the lines of the Lake Superior District Power Company has resulted in a rate for power of about four cents per kilowatt hour."

It will be noted that the rate paid by the Washburn Water Works Company is extremely high. When we consider the small number of customers served, it as apparent that high power costs will result in greatly increased rates for service. We contend that a duty rests upon the Washburn Water Works Company to exert every effort to minimize operating expenses. Mr. Thiessen is of the opinion that the installation of a smaller pump would result in a saving of $2,000 per year, and the evidence sustains this conclusion (R. 141-143). Where the actual op-

erating expenses, as in this case, amount to approximately $11,000 per year, the utility is guilty of a gross abuse of discretion in refusing to effect a saving of $2,000 per year. Such a saving would decrease the operating expenses approximately 18 per cent.

We submit that the action of the Commission in rejecting actual pumping costs should be viewed in the light of the situation in Washburn. Failure on the part of the company to economize to the extent of saving $2,000 per year, where the plant serves only 537 customers, results in an approximate average increase in rates of $3.70 per year per customer. Unless the utility adheres to a rigid program of economy, it will drive all of the inhabitants out of the city of Washburn.

B. Installation of meters will result in decreased operating costs.

The Commission, in commenting on the failure of the utility to install meters said (R. 51):

> "This Commission in previous decisions called attention to the need of installing meters upon at least the larger customers. A considerable part of the excessive pumpage year after year can be attributed to no other cause than the lack of restraint on customers as regards the waste of water. By January 1, 1923, only 51 meters were in use. During 1925, 21 additional were installed, while in 1926, 40 more were placed. During 1927, 44 meters were set, making a total of 156 metered and 369 unmetered customers on December 31, 1927. We believe the decrease in pumpage noted above is due largely to the installation of meters."

Data from the annual reports of the Washburn Water Works Company show that there were 150 meters in place in 1927, 172 in 1928 (R. 140), and the records of the com-

pany show that from January 10, 1929 to March 11, 1929, 50 additional meters were installed (R. 127).

W. G. Maxcy, the receiver, testified in his affidavit that it was not economical to install meters, and that the company had no funds with which to purchase and install the meters. The evidence, however, shows that a deposit was obtained from all the customers who obtained meters in 1929 (R. 127).

The evidence demonstrates conclusively that a considerable saving in pumping costs can be effected by the installation of meters. In 1928 the company had 14.66 per cent more meters installed than during the year 1927 (R. 140). The pumpage in gallons for the year 1927 was 68,550,000, while the pumpage in 1928 was 59,340,000 gallons, or a decrease of 13.4 per cent. While it does not necessarily follow that the decrease is due entirely to the installation of meters, it is significant that the percentage of increase in meters corresponds very closely to the percentage of decrease in pumpage. It is also significant to note that in 1927 power costs for pumping purposes amounted to $5-020.08, and in 1928 these costs were reduced to $4,581.05 (R. 108), a decrease of approximately ten per cent.

On March 11, 1929, the company had in place approximately 30 per cent more meters than in the year 1928. Assuming that no more meters were installed during the year 1929 and that the same ratio of decrease in cost of power purchased for pumping purposes would obtain during the year 1929 as for the year 1928 (14 per cent increase in meters resulting in 10 per cent decrease in cost of power for pumping purposes) the cost of power for pumping purposes during the year 1929 would be approximately 20 per cent less than that for the year 1928, or approximately the sum of $3665. The decrease in pumping costs represents a clear saving. The operating expenses for the year

1928, exclusive of pumping costs, are no higher than the operating expenses for 1927 (R. 108).

Mr. Hartt, the utility's engineer, testified in his affidavit (R. 112) that the difference in pumpage between the years 1926 and 1927 was due to the installation of the electric pump; that the pumpage of the steam pump was computed by counting the strokes, and that by reason of slippage in the steam pump the pumpage as computed by counting the strokes was inaccurate. We do not quarrel with this explanation. There is, however, no explanation by the utility for a decrease in pumping of approximately 9,200,000 gallons in 1928.

In view of the evidence in the case at bar, we believe the finding of the Commission that operating costs could be reduced through the installation of meters should not be disturbed.

C. Legal expenses should not be considered as normal operating expense.

The Railroad Commission, in estimating the operating expenses of the utility, disregarded the item of legal expenses. In this connection, the Railroad Commission said (R. 51):

> "* * * Further, during the last five years particularly, considerable sums have been charged to operation covering disbursements incurred fighting this Commission's orders. Totals of these items will not be considered in determining the normal cost of operating the Washburn property."

The language used by the Commission is significant. It will be noted that the Commission specifically points out that the item of legal expense would not be considered in determining the *normal* cost of operating the utility.

The Commission did not exceed its jurisdiction in so holding. It is reasonable to suppose that the present litigation will eliminate any further necessity for legal expense, particularly in connection with rate proceedings.

There is a line of authorities holding that legal expenses should not be included in the operating expenses for the purpose of arriving at a rate which will yield a fair return on the fair value of the property.

Spring Valley Water Works v. City, etc. of San Francisco, 192 Fed. 137, 190;
San Diego Water Co. v. City of San Diego, 118 Cal. 556, 574, 50 Pac. 633;
City of Winona v. Wisconsin-Minnesota L. & P. Co., 276 Fed. 996, 1005.

In *Monroe Gaslight & Fuel Co. v. Michigan Public Utilities Comm.,* 11 F. (2d) 319, 325, it was held that legal expenses may properly be considered as a part of the operating expenses for rate making purposes. However, in *Columbus Gas & Fuel Co. v. City of Columbus,* 17 F. (2d) 630, 640, the court said:

> "The Court is able to find no decision, however, where the Court has held directly that the legal expense of the utility, arising in preparation and prosecution of its claim of unconstitutionality, is allowable, to directly produce or influence that unconstitutionality. Such would appeal to the Court to be unreasonable as well as inequitable."

The utility is attempting to do that which the Court in the foregoing decision held could not be done; it is attempting to base the confiscatory character of the rate established upon the proposition that the Railroad Commission made no allowance for legal expense. We submit that such a claim is unreasonable and inequitable.

2. *Past losses need not be considered in fixing rates.*

The utility seems to base its right to receive an increase in rates upon the proposition that it has suffered losses in the past. The bill of complaint alleges (R. 23):

> "This annual confiscation has continued for several years in the past and is largely responsible for the present plight of the plaintiff company and relief should and must be granted, as set forth in this complaint."

The utility's contention is out of line with the decisions of this court. It is well settled that

> "Past losses cannot be used to enhance the value of the property or to support the claim that rates for the future are confiscatory."
>
> *Board of Public Utility Commrs. v. New York Telephone Co.*, 271 U. S. 23, 31;
> *Galveston Electric Co. v. Galveston*, 258 U. S. 388, 395;
> *Georgia Ry. & P. Co. v. Railroad Comm.*, 262 U. S. 625, 632.

3. *Return of 7% on value of $75,000 not confiscatory*

The order of the Commission of December 4, 1928 provides for a return of 7% on a value of $75,000.00 (R. 52). A return of 7% for the Washburn Water Works Company, situated as it is, is not confiscatory.

In *Cedar Rapids Gaslight Co. v. Cedar Rapids*, 223 U. S. 655, 670, the court declined to reverse the state court which upheld a rate of return exceeding 6%.

A rate of return of 6% was sustained in *Stanislaus*

County v. San Joaquin and K. River etc. Co., 192 U. S. 201; *Knoxville v. Knoxville Water Co.*, 212 U. S. 1; *Des Moines Gas Co. v. Des Moines*, 238 U. S. 153. See also *Dayton-Goose Creek R. Co. v. United States*, 263 U. S. 456, 486.

In *McCardle v. Indianapolis Water Co.*, 272 U. S. 400, 420, it was held that a return of 7% was not confiscatory.

The question as to whether a return in a given case is unreasonable depends upon all the facts and circumstances in the case.

In *Bluefield Water Works and Imp. Co. v. Public Service Commission*, 262 U. S. 679, the court pointed out that, in *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, it was held, pages 48-50:

> "That the question whether a rate yields such a return as not to be confiscatory depends upon circumstances, locality and risk, and that no proper rate can be established for all cases; and that, under the circumstances of that case, 6 per cent was a fair return on the value of the property employed in supplying gas to the City of New York, and that a rate yielding that return was not confiscatory. In that case the investment was held to be safe, returns certain and risk reduced almost to a minimum—as nearly a safe and secure investment as could be imagined in regard to any private manufacturing enterprise."

In view of the economic conditions prevailing in the city of Washburn, it is safe to say that no industry in the city could possibly make a return of 7% on the fair value of its property. In these circumstances, is the Washburn Water Works Company entitled to a 7% return? The answer to this question is in the negative. The Washburn Water Works Company should be compelled to share in the general depression, and receive a return commensurate with the return of similar business enterprises located in the city. We suggest to the court that the Railroad Com-

mission in this case would have been fully justified in fixing a rate of return at a much lower figure than 7%. The utility, therefore, is in no position to urge that a return of 7% is confiscatory.

Again, in determining whether the return established by the order is confiscatory, we must not lose sight of the fundamental principle that the burden rests on the utility to prove that the rate of return is confiscatory.

> *Knoxville v. Knoxville Water Co.*, 212 U. S. 1;
> *United Fuel Gas Co. v. Railroad Comm.*, 73 L. ed. 390, 398.

It is also fundamental that the findings of an administrative board or tribunal are conclusive where supported by the evidence. In *United States v. Erie R. Co.*, (Adv. Opinions), 74 L. ed. 74, the court, in speaking of an order of the Interstate Commerce Commission, said, pages 75-76:

> "* * * The findings of the Commission [Interstate Commerce Commission], that the broker acts only as agent and that from the time that the pulp is put aboard the steamer there is a continuing intent that it should be transported to Garfield, ought to have been accepted by the District Court as conclusive, since there was ample evidence to sustain it."

An order of an administrative body is presumptively correct.

> *Wisconsin-Minnesota L. & P. Co. v. R. R. Comm.*, 267 Fed. 711, 718;
> *United Fuel Gas Co. v. R. R. Comm.*, 73 L. ed. 390, 398;
> *Cambridge Electric Light Co. v. Atwill*, 25 F. (2d) 485, 487.

In *Knoxville v. Knoxville Water Company,* 212 U. S. 1, the court said, page 8:

> "The constitutional invalidity should be manifest, and where that invalidity rests upon disputed questions of fact the invalidating facts must be proved to the satisfaction of the court. In view of the character of the judicial power invoked in such cases it is not tolerable that its exercise should rest securely upon the findings of a master, even though they be confirmed by the trial court. The power is best safeguarded against abuse by preserving to this court complete freedom in dealing with the facts of each case. Nothing less than this is demanded by the respect due from the judicial to the legislative authority."

The order of the Commission in the case at bar, we submit, is supported by the evidence. The Commission has exercised its discretion honestly and fairly, and has attempted to fix a rate which will yield to the utility a fair return upon the fair value of its property in the city of Washburn. Under the record in this case, we do not believe it has been made to appear that the order of the Commission is unreasonable, unlawful or confiscatory.

We respectfully submit that the decree of the lower court should be reversed.

JOHN W. REYNOLDS,
Attorney General,

SUEL O. ARNOLD,
Special Counsel,

Attorneys for Appellants.

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CHARLES ELMORE

In the
Supreme Court of the United States

OCTOBER TERM, 1929

No. 301

RAILROAD COMMISSION OF WISCONSIN, LEWIS E. GETTLE, ADOLPH KANNEBERG, et al., Etc.,

Defendants and Appellants,

v.

W. G. MAXCY, as Receiver of the Washburn Water Works Company, and Washburn Water Works Company,

Plaintiffs and Respondents.

RESPONDENTS' BRIEF

H. L. BUTLER,
H. H. THOMAS,
B. H. STEBBINS,
R. M. STROUD,
R. M. RIESER,
Attorneys for Plaintiffs and Respondents.

OLIN AND BUTLER,
Of Counsel.

Straus Printing Co., Madison, Wis.

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In the
Supreme Court of the United States
OCTOBER TERM, 1929
No. 301

RAILROAD COMMISSION OF WISCONSIN, LEWIS E. GETTLE, ADOLPH KANNEBERG, et al., Etc.,

Defendants and Appellants,

v.

W. G. MAXCY, as Receiver of the Washburn Water Works Company, and Washburn Water Works Company,

Plaintiffs and Respondents.

RESPONDENTS' BRIEF

This is an appeal from a judgment and decree of the District Court of the United States for the Western District of Wisconsin, three judges sitting as a statutory court, entered April 5, 1929 enjoining the appellants from interfering with the respondents in charging and collecting reasonable rates for water furnished to the City of Washburn, Wisconsin, and from enforcing an order of the Railroad Commission of Wisconsin dated December 4, 1928, prescribing certain rates for water furnished in said city.

The case is founded upon two principal claims based upon facts alleged in the complaint and admitted in the answer:

First: The Commission has ignored actual operating expenses and substituted its own estimate of what should be proper operating expenses, thereby decreasing the allowance for expenses of the company by over $5,000 without any evidence to support such action.

Second: The Commission without other than evidence of the cost of reproduction before it has disregarded such evidence and has made an arbitrary valuation of the property of the company without any evidence to support the same thereby confiscating the company's property.

STATEMENT OF FACTS

The value claimed before the Commission:

The plaintiffs filed with the Commission in December, 1927, a schedule of increased rates, a copy of which is attached to the complaint as Exhibit B, (R. 31-38) in which it was claimed, as it was claimed in the proceeding before the Commission that the property devoted to the public use was of the value of One Hundred and Thirty Thousand ($130,000.00) Dollars, and that the revenue of the company was insufficient to yield a fair return.

The Commission, contrary to the provisions of Sec. 196.20 Wisconsin Statutes 1927, refused to accept this rate for filing. This statute reads as follows:

"No change shall thereafter (after the passage of the Wisconsin Utility Act) be made in any schedule, including schedules of joint rates, except upon ten days' notice to the commission, and all such changes shall be plainly indicated upon existing schedules, or by filing new schedules in lieu

thereof ten days prior to the time the same are to take effect; provided, that the commission, upon application of any public utility, may prescribe a less time within which a reduction may be made."

The company, thereupon expressly reserving its rights under such original filing, made application for such increase in rates.

The Order of the Commission:

Following the hearing upon this application and on December 4, 1928, eleven months after the date used for pricing the property of the plaintiffs, the Commission issued an order (Exhibit C, R. 38-42) establishing the value of the property of the plaintiffs at Seventy-Five Thousand ($75,000) Dollars against the claimed value of One Hundred Thirty Thousand ($130,000) Dollars.

The Evidence Before the Commission:

In arriving at this value or rate base the Commission had before it as the lowest competent estimate of value the valuation of its own engineering department fixing the cost of reproducing the physical property without working capital, going value and material and supplies at One Hundred Fourteen Thousand Eighty-Nine ($114,089) Dollars and depreciated at Eighty-Seven Thousand One Hundred Sixteen ($87,116) Dollars. (Exhibit C. R. 39).

This valuation was made as of January 1, 1928 and had the Commission used the prices for the physical elements composing the plant of the plaintiffs prevailing at or about the date of its decision, the cost of reproduction would have been One Hundred Twenty-One Thousand Six Hundred Seventeen ($121,617) Dollars and depreciated Ninety-Three Thousand Three Hundred Sixty-Four ($93,364) Dollars for the same

items. (R. 57). Such valuation would have more nearly reflected price levels for a period of several years preceding the valuation. (R. 101, R. 85, R. 86).

Likewise the Commission had before it an appraisal as of June 30, 1923 showing a value undepreciated of One Hundred Thirty-Two Thousand Eight Hundred Sixty-Two ($132,862) Dollars. In arriving at this value the Commission had added but 12% for general overhead as against 15% now recognized by the Commission as being proper so that had this 12% item been increased to 15% in accordance with the present practice of the Commission the total value would have been One Hundred Thirty-Six Thousand Four Hundred Twenty-One ($136,421) Dollars.

The Commission Used a Split Inventory Valuation Never Offered in Evidence:

In addition the Commission referred to a split inventory valuation of Seventy-One Thousand Five Hundred Thirty ($71,530) Dollars which was not introduced at the hearing before the Commission or in the trial court, but this value was slightly over Thirty-Five Hundred ($3,500) Dollars less than the figure it finally adopted as the value of the property. A split inventory valuation takes the ten year average cost of reproducing property actually installed prior to January 1, 1916 at such average cost and adds actual costs of elements installed after January 1, 1916 and then depreciates the same. (See *Ashland Water Company vs. Railroad Commission*, 7 Fed. (2nd), 924, 929, 930.)

The split inventory figure of Seventy-One Thousand Five Hundred Thirty ($71,530) Dollars referred to by the Commission however could not have included One Thousand ($1,000) Dollars of additions made between the date of the hearing before the Commission and the decision by the Com-

mission December 4, 1928. (See Hartt affidavit, R. 86, Maxcy affidavit R. 77.)

Nor could it have included any allowance for working capital or materials and supplies. Items which the Commission estimated in 1925 would require an additional Three Thousand ($3,000) Dollars although in this proceeding it reduced that figure to Twenty-Five Hundred ($2,500) Dollars. If these items were considered it does not appear so of record and the Commission nowhere has indicated that they were considered. However, these items if added to the asserted split inventory valuation so as to have brought that valuation to the date of the Commission's inquiry and so as to have reflected the various elements considered by the Commission would have produced a total split inventory value of Seventy-Five Thousand Five Hundred Thirty ($75,530) Dollars or Five Hundred Thirty ($530) Dollars more than was allowed by the Commission in this case and that without any allowance for going value.

Effect of Commission's Consideration of Case:

It may be fairly stated therefore that while the Commission went through the motion of considering a valuation reflecting the cost of reproduction as presented to it by its own staff, its ultimate conclusion and decision was based upon an arbitrary split inventory valuation never introduced into the record.

The force of this action by the Commission is emphasized by the allegations of the complaint admitted in the answer to the effect that if to the cost of reproducing the property, found by the Commission in 1910, there is added the actual additions at actual cost to the date of this inquiry, the total value thus arrived at is Eighty-Six Thousand ($86,000.00) Dollars. The 1910 valuation, reflecting as it would substantially the prices up to 1916, with additions at actual cost after

that time, is substantially a split inventory valuation. (Maxcy affidavit, R. 77.)

The Commission Changed its Method of Computing Depreciation:

The record also shows that the Commission changed its policy with respect to depreciation between 1923 and 1928. A comparison of the figures used by the Commission's engineers demonstrates this. (R. 86).

In the 1923 valuation the property was determined to be in 85.7 per cent condition. (R. 82). At that time the majority of the property had been in place thirty-six years.

In the 1928 decision of the Commission five years after the former valuation, the property was found to be in 76 per cent condition. In other words the Commission for thirty-six years depreciated the property 14.3 per cent and for five years following the thirty-six year period depreciated it 9 per cent. (R. 82).

If the Commission had used the same rate of depreciation for the thirty-six year period that it used for the five year period following 1923, the property in 1923 would have been in 20.5 per cent condition and in 13.5 per cent condition in 1928. On the other hand, if the Commission had followed its previous practice of depreciating the property, then at the time of its decision the property would have suffered an additional 2.7 per cent depreciation, or would have been in 83 per cent condition, as against the 76 per cent assigned to it by the Commission's engineers.

The reason for this change in this case was not explained by the Commission, either in its decision or by any evidence that was offered.

An examination of the Commission's figures indicates, however, that this higher rate of depreciation employed by the

Commission is due to a change made from the four per cent sinking fund method of computing depreciation to the straight line method of depreciation. This change in procedure is contrary to the accepted practice of the industry and for that reason is arbitrary. (Hartt affidavit R. 85).

The Actual Operating Expenses of the Company Were Not Used by the Commission:

The Commission also had before it the operating expense of the company for the five-year period preceding 1927, averaging Fifteen Thousand Three Hundred Two and 49/100 ($15,302.49) Dollars per year, (R. 32, 78) and in addition the 1927 operating expenses also before the Commission show that the actual operating expenses of this plant cannot be reduced below the average of Fifteen Thousand Three Hundred Two and 49/100 ($15,302.49) Dollars per year as reflected by the history of the preceding six year period. For 1927 they were Fifteen Thousand Fifty-five and 52/100 ($15,055.52) Dollars and for 1928, Fourteen Thousand Nine Hundred Thirteen and 19/100 ($14,913.19) Dollars; all these items being before any allowance for depreciation was made.

Adding thereto adequate allowance for depreciation or Eleven Hundred Forty-One and 81/100 ($1,141.81) Dollars, or 1 per cent on the cost of reproduction found by the Commission as of January 1, 1928, and One Thousand ($1,000) Dollars, annually to amortize the Railroad Commission and legal expenses now accumulated and unpaid (R. 78), the actual operating expenses will be Seventeen Thousand Fifty-Four and 90/100 ($17,054.90) Dollars before any return will be forthcoming. (Complaint R. 14-15 admitted by answer R. 60, last paragraph, Maxcy affidavit page 78, R. 93.) It should be noted that the six year average of operating ex-

penses above does not take into consideration an adequate reservation for additional taxes, resulting from a higher valuation placed upon the property by the City of Washburn after 1926, the valuation having been increased from Fifty Thousand ($50,000.00) Dollars to Seventy-Five Thousand ($75,000.00) Dollars.

These figures represent disbursements that will actually be made based on the experience of the seven years 1922-1928 inclusive, and as filed in the annual returns of the company do not include obligations incurred for legal fees, nor compensation for the receiver, which, according to the allegations of the complaint, would bring the operating expenses of this company up to Eighteen Thousand ($18,000.00) Dollars per year (Complaint R. 14-15 admitted by Answer R. 60, Paragraph XIV, Last two sentences), or using the higher valuations shown in the proceeding, the total revenue required before return on the value of the property, would be Nineteen Thousand Two Hundred and Fifty-Four ($19,254.00) Dollars. (Maxcy affidavit R. 78 and 80).

Against this total expense the company has actual revenue, averaging Seventeen Thousand and Seventy ($17,070.00) Dollars, during the five-year period aforesaid, and for 1927 Seventeen Thousand Nine Hundred Ninety-Six and 24/100 ($17,996.24) Dollars, and Seventeen Thousand Six Hundred Thirty-Nine and 15/100 ($17,639.15) Dollars for the year 1928.

Against this actual operating history of this company, the Commission assumed a hypothetical operating estimate, with operating expenses at Twelve Thousand Eight Hundred and Sixty-Seven ($12,867.00) Dollars per year for all items except return upon investment, *or over five thousand ($5,000) Dollars less than the actual operating expenses.* To do this the Commission cut down the actual pumping expenses by Sixteen Hundred and Fifty ($1,650.00) Dollars. This cut

was made because, as the Commission in its order states (Exhibit C), (R. 40-41) the pumping cost could be reduced by installing a smaller pump and thereby obtaining lower rates for electrical energy purchased. The contention is denied and Mr. Maxcy outlines the care taken in selecting the present pump. (Maxcy affidavit R. 79). Moreover the present power contract would prevent such saving. (Maxcy affidavit R. 79).

The Commission says "in order to secure the lower rate for power the large motor and pump must be idle *and with intelligent operation and fortunate distribution of large fires or other necessity of operating the large pump a substantial saving may be made.* The margin appears to be sufficient to write off the fixed charges and the cost of additional equipment and labor of installation within a few years, assuming occasional use of the large pump and motor now installed *with wise handling, proper installation and co-operation and favorable circumstances the saving may* amount to two thousand dollars a year." (R. 40). Note that the action of the commission is based upon pure speculation.

This conclusion was arrived at in spite of the fact that its engineers on the hearing testified (admitted by answer, R. 57) that they had insufficient evidence to recommend the installation of an additional pump and the answer admits this to be true. (R. 57).

Without any evidence whatsoever in the record, the Commission cut the distribution expense, commercial and general expense in the amount of Twenty-seven hundred eighteen and 45/100 ($2718.45) Dollars below those items representing actual expenditures for 1927. (See admission in answer R. 57). In other words, the Commission, without any evidence in the record made an arbitrary reduction in its estimate of operating expenses of Forty Three Hundred Sixty Nine and 28/100 ($4369.28) Dollars. (R. 57).

While the answer alleges that the accounts of the plaintiff were not kept in accordance with the uniform classification of accounts, the immateriality of this fact is reflected by the correction of the accounts made by the Commission's auditors. The resulting variation made a difference of only Fifty ($50.00) Dollars.

Also the Commission excluded from its estimate of operating expenses the actual obligations of the company for receiver's fees and legal expenses, claiming that it was not going to allow anything for expenses "incurred fighting this Commission's orders." (R. 41).

The complaint alleges and the answer admits that not all of the legal expenses were incurred in fighting the Commission's orders and that every suit commenced by the company to fight the Commission's orders was successful. (R. 57).

By this method of cutting the estimated operating expenses by Forty Three Hundred Sixty Nine and 28/100 ($4369.28) Dollars below those actually representing the operating expenses in 1927, and by disallowing accrued charges for Railroad Commission and legal and receiver's expense, amounting to One Thousand ($1,000.00) Dollars, annually, the Commission provided a return of Fifty Two Hundred and Fifty ($5250.00) Dollars, or seven per cent on the Seventy Five Thousand ($75,000.00) Dollars of value, which it assigned to this plant.

The Actual Present Value of the Plaintiff's Property:

While the foregoing figures as to value of the property, have been presented for the purpose of showing that the Commission arrived at an arbitrary result and thereafter the figures were used in comparison with the Commission's valuation of Seventy Five Thousand ($75,000.00) Dollars, the evidence now submitted shows that the depreciated value of

the physical property, with materials and supplies and working capital was One Hundred Seventeen Thousand Nine Hundred and Fifty Two ($117,952.00) Dollars and with going value One Hundred Twenty Two Thousand Nine Hundred and Fifty Two ($122,952.00) Dollars. Hartt affidavit R. 84).

Had the Commission used the prevailing prices at the time of announcing its decision, nearly a year after hearing the testimony (December, 1928, or January 1, 1929, instead of January 1, 1928), and had the Commission taken only the information of its own engineer, and incidentally the lowest figure of value submitted and brought it down to the date of the Commission's order to reflect the increase in cost of reproduction, resulting from the recovery of a temporary slump, the Commission's own engineer would have shown a value for this property of One Hundred Twenty One Thousand Six Hundred and Seventeen ($121,617.00) Dollars against his original One Hundred Fourteen Thousand and Eighty Nine ($114,089.00) Dollars. (Hartt affidavit R. 86-87, Thiesen R. 97). Moreover this item of One Hundred Twenty One Thousand Six Hundred and Seventeen ($121,617.00) Dollars, the undepreciated reproduction cost of the property, after bringing the Thiesen valuation down to date, the date of the Commission's order, was about ten per cent under that of Hartt, representing the company in this case. (Hartt affidavit R. 86). While as a result of applying excessive and arbitrary depreciation methods, the depreciated value of the property was 22 per cent less under the Thiesen valuation than it was under the Hartt valuation. (Hartt affidavit R. 87). The table of comparisons in the record illustrates this situation graphically. (R. 87).

Cause of Difference Between Plaintiffs' and Defendants' Experts:

That this difference between the expert for the Commission and the expert for the company is due primarily to the change in the method of determining the proper depreciation by the Commission is demonstrated by applying instead of the 76 per cent figure found by Thiesen, as representing the average condition of this property in 1928, the 83 per cent figure which would reflect the depreciation of this property had the depreciation ascribed in 1923 been carried down to date. Multiplying therefore the corrected Thiesen valuation of One Hundred Twenty One Thousand Six Hundred and Seventeen ($121,617.00) Dollars by 83 per cent and the result is One Hundred Two Thousand ($102,000.00) Dollars, which would represent Thiesen's depreciated value of the physical property of the plant as of the time the Commission made its decision in 1928 and after applying a rate of depreciation comparable with the depreciation assigned to the property in 1924.

The Rate Base Established by Plaintiffs:

On this basis again there would be a difference between Hartt, representing the plaintiffs, and Thiesen, representing the Commission of less than 13 per cent. Adding to the One Hundred and Two Thousand ($102,000.00) Dollars item, a proper allowance for working capital, materials and supplies of Three Thousand ($3,000.00) Dollars, as found in 1925 by the Commission and an additional One Thousand ($1,000.00) Dollars, for additions made and not included in the Thiesen valuation, plus Five Thousand ($5,000.00) Dollars, as going value, and the depreciated value of this property with working capital, materials and supplies and going value, corrected to reflect the judgment of the Commission, on the basis of the

1924 valuation, is One Hundred and Eleven Thousand ($111,000.00) Dollars, or One Thousand ($1,000.00) Dollars more than the basis upon which the present temporary rates were established, and but Eleven Thousand ($11,000.00) Dollars less than that set forth in the valuation submitted by Mr. Hartt for the company.

Bearing in mind that on the present rates, the annual revenue provided bythe temporary rate schedule proposed in this proceeding (Exhibit D, R. 42-45), will produce not to exceed Twenty-seven Thousand Nine Hundred and Fifty Eight ($27,958.00) Dollars, (R. 45) the rates now in force will be inadequate to yield a fair return on even One Hundred and Ten Thousand ($110,000.00) Dollars valuation. The later check of Mr. Meuwsen (R. 88) shows that even less than was originally estimated will be realized in that the expected revenue will not exceed Twenty Seven Thousand Two Hundred and Eighty One ($27,281.00) Dollars, against the required revenue on the One Hundred and Twenty Two Thousand ($122,000.00) Dollars valuation of Twenty Nine Thousand and Ninety ($29,090.00) Dollars, (Maxcy affidavit, R. 47) this will be Eighteen Hundred and Nine ($1809.00) Dollars short of the required amount. A 7 per cent return would require Twenty Seven Thousand Six Hundred and Ninety Four ($27,694.00) Dollars in revenue, which would be Four Hundred and Thirteen ($413.00) Dollars, more than will be realized on the present rates. A 6 per cent return would require Twenty Six Thousand Five Hundred and Seventy Four ($26,574.00) Dollars, or Seven Hundred and Seven ($707.00) Dollars less than the amount to be realized on the present rates. If on the other hand we check the present rates on the basis of One Hundred and Ten Thousand ($110,000.00) Dollars valuation, being that assumed for the temporary rates, we would reduce the basis Three Hundred and Fifty Eight ($358.00) Dollars annually and would require in annual

revenues Twenty Seven Thousand Six Hundred and Ninety Six ($27,696.00) Dollars to obtain an 8 per cent return, as against Twenty Seven Thousand Two Hundred and Eighty One ($27,281.00) Dollars, to be realized on the present rates, that is Four Hundred and Fifteen ($415.00) Dollars more than will be realized, while a 7 per cent return would require annual revenues of Twenty Six Thousand Five Hundred and Ninety Six ($26,596.00) Dollars, or Six Hundred and Eighty Five ($685.00) Dollars less than the anticipated results under the present rates.

SUMMARY OF ARGUMENT

The order of the Commission is attacked on two propositions that appear undisputed in the record:

FIRST: THE COMMISSION HAS IGNORED ACTUAL OPERATING EXPENSES AND SUBSTITUTED ITS OWN ESTIMATE OF WHAT SHOULD BE PROPER OPERATING EXPENSES, THEREBY DECREASING THE ALLOWANCE FOR EXPENSES OF THE COMPANY BY OVER $5,000 WITHOUT ANY EVIDENCE TO SUPPORT SUCH ACTION.

SECOND: THE COMMISSION WITHOUT OTHER THAN EVIDENCE OF THE COST OF REPRODUCTION BEFORE IT HAS DISREGARDED SUCH EVIDENCE AND HAS MADE AN ARBITRARY VALUATION OF THE PROPERTY OF THE COMPANY WITHOUT ANY EVIDENCE TO SUPPORT THE SAME THEREBY CONFISCATING THE COMPANY'S PROPERTY.

The foregoing propositions are not contradicted but it is claimed by counsel that they are justified because of peculiar conditions alleged to exist in Washburn.

The Commission without other than evidence of the cost of reproduction before it has disregarded such evidence and has made an arbitrary valuation of the property of the company without any evidence to support the same thereby confiscating the company's property.

A. It attempted to sustain this arbitrary result on asserted economic conditions in Washburn which are speculative and wholly unrelated to the plaintiff's property.

1. The plaintiff's own business history establishes the Commission's action as arbitrary.

2. The plant of the plaintiffs is not too large for the community.

3. The claim of decrease in population is unsupported in the record.

4. The asserted tax delinquency does not justify the conclusions of the Commission drawn therefrom.

5. The financial condition of the City of Washburn shows that the city is above the average.

6. The Commission under the decisions of the state and federal courts was required to give consideration to and have its valuation reflect such consideration of the increased cost of reproducing the property at present day prices.

B. The valuation alleged by the Commission to reflect the cost of reproduction as of the time of its decision was in fact inadequate.

1. The valuation thus submitted by the Commission's engineers being of a date eleven months preceding the actual decision, during which time a material change in prices took place, and since the prices on the date of this decision more nearly reflected the average prices during a considerable period preceding the valuation, the valuation figures adopted were inadequate.

2. One reason for the low cost of reproduction valuation submitted by the Commission's engineers results from unjustifiable depreciation of the property. This is demonstrated by a reading of the analysis in the statement of facts herewith. The appellants' counsel seeks to justify it however and in doing so misconstrues the effect of the testimony.

C. The Commission under the decisions of the state and federal courts was required to give consideration to and have

its valuation reflect such consideration of the increased cost of reproducing the property at present day prices.

D. By not allowing going value and failing to fix that element of value in this case the Commission deprives the plaintiffs of an element of value and therefore of a property right.

E. The plaintiffs are entitled to the "independent judgment of the court as to both the law and the fact" especially where it is apparent from the proceedings that a deliberate attempt on the part of the Commission is being made to circumvent the decisions of this court guaranteeing due process.

F. The Commission's only justification for ignoring the decisions of the court are the conditions referred to above but the record fails to disclose any justification for such action and nowhere in the evidence is it shown that the conditions relied upon by the Commission had any effect upon the value of the property of the plaintiffs.

G. The efforts on the part of the Commission to find a value by comparing rates in Washburn with rates in other communities and the claim that the rates in Washburn were unusually high and that this fact affected the value of the property were clearly erroneous.

The commission has ignored actual operating expenses and substituted its own estimate of what should be proper operating expenses, thereby decreasing the allowance for expenses of the company by over $5,000 without any evidence to support such action.

A. The reduction of actual pumping costs by $1,650 annually was arbitrary.

B. The reduction of distribution, commercial and general expenses below the actual previous amounts for such items was purely arbitrary.

C. The failure to allow amortization of accumulated legal expense and receiver's fees was wholly arbitrary.

D. By thus substituting a theory of operating expenses over $5,000 less than the actual operating expenses the Commission improperly and illegally interfered with the management of the company and the result thus obtained can therefore not be sustained.

Upon either objection raised by the record the order of the Commission must fall.

ARGUMENT

THE COMMISSION WITHOUT OTHER THAN EVIDENCE OF THE COST OF REPRODUCTION BEFORE IT HAS DISREGARDED SUCH EVIDENCE AND HAS MADE AN ARBITRARY VALUATION OF THE PROPERTY OF THE COMPANY WITHOUT ANY EVIDENCE TO SUPPORT THE SAME THEREBY CONFISCATING THE COMPANY'S PROPERTY.

A. It attempted to sustain this arbitrary result on asserted economic conditions in Washburn which are speculative and wholly unrelated to the plaintiff's property.

1. The plaintiffs' own business history establishes the Commission's action as arbitrary.

The Commission has entirely misconceived the conditions in the city of Washburn. The company at the end of 1928 had 135 more customers than it had in 1914 and but 85 customers less than during the brightest days of the war boom. Thus the company has shown marked improvement over conditions existing in 1914, in that it has far more customers than it had at that time. In fact it shows an increase of 27 per cent in net customers between 1914 and 1928.

2. The plant of the plantiffs is not too large for the community.

To sustain the claim that the plant is over-built counsel refers to certain pictures taken in Washburn, but these do not demonstrate anything. The pictures are only another effort to overstate the situation in Washburn.

Counsel apologizes for this argument in the next breath by saying "We do not contend that the construction of the plant

was wasteful, extravagant or imprudent." (Brief, page 37.) And again says "We confess that no exhaustive study was made by the Commission or by counsel representing the appellant to show the extent of over-development of the utility property." (Brief, page 37). The answer of the defendants (R. 62-63) says

> "Defendants admit that the plaintiffs' plant was and is well designed and constructed, that certain hydrants of which complaint was made were installed under direction of the city officials, and that there was no lack of reasonable or proper prudence in design or construction."

3. The claim of decrease in population is unsupported in the record.

That the war population was temporary and did not affect or require any extensive investment by the plaintiffs is evidenced by the fact that it resulted in but a small increase of water customers. The removal of the powder company houses (R. 91) is further evidence of that fact.

The only authentic evidence of the population at the time of the trial was the census of 1920, showing 3707 people in Washburn.

The remaining evidence illustrates the length to which the appellants are driven to justify their position. Evidence of the ministers of the decline of church population of two congregations may be, as suggested at the argument in the lower court, accounted for as well by poor preaching as on any theory of depopulation. Decline in church population everywhere has progressed to the point where it presents a crisis in the church world. Many reasons for it have been advanced, including the automobile, prohibition and the radio, but we venture to say that the theory of counsel in this case is unique in claiming that this fact can be connected with anything affecting a water utility. The fact remains that those congre-

gations wherever situated having good preachers are growing and the rest are declining.

The only other evidence, that there are now only 2700 people in Washburn, as asserted in appellants' brief, is based upon the affidavit of W. A. Robinson, a newspaper editor who says he made a check of potential newspaper customers in said city and "derived at the conclusion, and is of the opinion that the population of said city was about 2700" at the time of the affidavit. (R. 110).

4. The asserted tax delinquency does not justify the conclusions of the Commission drawn therefrom.

Tax delinquency is cited as another evidence of adverse conditions in Washburn, but nowhere in the record is it shown that a single lot, subject to delinquent taxes, is occupied by improvements or that a single delinquent lot is responsible for a single cent of investment by the plaintiff company.

How then can that situation benefit the appellants? A town which has had a water works company since 1889, has been a county seat since that time, shows a steady increase in customers of its water utility, an increase in assessed and true valuation over that preceding the war boom, demonstrates its stability when during a boom period prices nearly doubled and yet the recession following the war has never gone below the level preceding the boom. That a sudden increase in the population undoubtedly resulted in speculation, that as a result of such speculation additional platting was done, and that at the end of the boom these artificial conditions were destroyed, is to be expected and the delinquent tax situation only reflects that situation. Washburn is to be credited with unusual stability to have resisted the reaction during the ten-year period following the boom by showing that artificial values have been only partially wiped out. The

management of the company with years of experience (R. 45) demonstrated its competency by avoiding over-expansion on its part during this temporary period and by resisting demands on the part of the appellant Commission to force such over-expansion.

State vs. Washburn Water Works Company, 182 Wis. 287.

While a considerable effort is made in the appellants' brief to picture a progressive retrogression in Washburn, a claim which the record does not justify, in our judgment, it is true of course that Washburn enjoyed a temporary boom. However, this was never reflected by any demands of the plaintiffs, the rates remained unchanged from 1910 to 1921, and the increase in 1921 was founded upon increased operating expenses and not because asserted increase in value claimed to be due to the temporary war boom, as reflected by the larger employment at the Du Pont Powder factory. While values mounted from one million, two hundred forty one thousand two hundred and twenty three ($1,241,223) Dollars in 1914, at the out-break of the war, to two million six hundred nine thousand six hundred and sixty eight ($2,609,668) Dollars right after the war on all property within the city of Washburn, and then declined to one million three hundred forty two thousand four hundred and eighty ($1,342,480) Dollars by 1928 (R. 113-114), the plaintiff company did not attempt to capitalize this value. On the other hand the Commission attempted unsuccessfully in its 1924 value to take this decrease in temporary value and apply it against the company. (R. 7, 59). It is a fact that values today in Washburn are one hundred thousand ($100,000) Dollars higher than they were in 1914. (R. 113, 114). And that this condition exists in spite of the fact that over one hundred houses, erected dur-

ing the temporary war period, have been removed and many others have been destroyed by fire. (R. 91).

5. The financial condition of the City of Washburn shows that the city is above the average.

While it is a matter of common knowledge that municipal indebtedness generally increased in most cities after the war and has remained higher than preceding the war, in Washburn while this indebtedness likewise increased immediately preceding the war from Thirty Five thousand six hundred ninety two and 50/100 ($35,692.50) Dollars in 1913 to Eighty five thousand three hundred ninety three and 75/100 ($85,393.75) Dollars in 1927, after that it was decreased to Thirty Five Thousand ($35,000) Dollars by 1929 (R. 114). These conditions hardly justify any conclusions approaching those portrayed in appellants' brief.

6. The Commission under the decisions of the state and federal courts was required to give consideration to and have its valuation reflect such consideration of the increased cost of reproducing the property at present day prices.

While it appears in the record that the speculative value of the war period has been discounted by subsequent evidence, there is no evidence in the record showing or justifying any conclusion that the wiping out of the speculative value has in any manner affected the true value of this very necessary utility in the city of Washburn, nor is there any evidence showing, what, if any, effect the conditions recited by the Commission had or might have had on the values of the water works property. The Commission merely recited the existence of these conditions and then arbitrarily guessed that they must have had some effect upon the value of the water works property and therefore ignored the only competent evidence in the record as to the value of this property.

B. The valuation alleged by the Commission to reflect the cost of reproduction as of the time of its decision was in fact inadequate.

1. The valuation thus submitted by the Commission's engineers being of a date eleven months preceding the actual decision, during which time a material change in prices took place, and since the prices on the date of this decision more nearly reflected the average prices during a considerable period preceding the valuation, the valuation figures adopted were inadequate.

As indicated in the statement of facts herewith, the Commission's engineering staff took as their valuation date January 1, 1928. This date reflected prices below the normal prices existing since 1923, so far as they affected this utility property (R. 85). After this valuation eleven months were permitted to elapse before the Commission announced its decision. In the meantime the cost of reproducing the property had increased over $7,000.00 (R. 86, 97). Moreover an additional $1,000.00 of equipment had been added.

The engineering valuation approved by the Commission in its decision, omitted $2500 to $3000 of working capital and material and supplies and made no allowance for going value. A valuation as of January 1, 1929, by the Commission's engineering staff or twenty-seven days after its decision, submitted in this case, shows that the proper cost of reproduction valuation as of the date of the decision would have resulted, even on the Commission's methods in a value of $95,865.00 (R. 97) without any allowance for going value as against the $87,000.00 approved by the Commission. The higher valuation which thus resulted is confirmed by the other valuations by the Commission. (R. 7-9).

The valuations of the Commission show a studied effort to cut value wherever possible, as evidenced by the analysis submitted in the statement of facts herein. It is further demon-

strated by the analysis of depreciation in the statement of facts.

2. One reason for the low cost of reproduction valuation submitted by the Commission's engineers is the unjustifiable depreciation of the property.

This is demonstrated by a reading of the analysis in the statement of facts herewith. The appellants' counsel seeks to justify it however and in doing so misconstrues the effect of the testimony.

The record is clear that the Commission's engineer Thiesen and the plaintiffs' engineer Hartt both based their estimate of the extent of depreciation of the property on the results of an examination of the property. Hartt shows a broad experience and familiarity with the factors affecting depreciation. Thiesen who also made a valuation in 1924 seems not to have even the confidence of the Commission at the time of the 1924 decision. In that decision, however, the Commission accepted the sinking fund method of depreciating property the same as used by Hartt in his valuation in this proceeding.

Thus we have the experts agreed as to the method of determining depreciation in 1924 and pursuing like methods of determining such depreciation in 1929 but arriving at a different result primarily because the Commission had abandoned the sinking fund method of depreciating property which it had previously approved. The result is that as to the cost of reproducing the property the variation between the figures of these engineers is but 10% but after depreciation the variation is 22%. On the other hand if the same method of depreciation had been used by Thiesen in 1928 that he used in 1924 the variation between the figures after depreciation would have been 13%.

The result therefore is that after the Wisconsin Supreme Court in the *Waukesha case,* 191 Wis. 565, 569, compelled the

Commission to abandon its split inventory valuations, the Commission promptly abandoned its former approved policy for one that would help it arrive at a similar result by cutting the value of the property down on another theory, and so it adopted the straight line method of depreciation. This method is not used by the industry and does not actually reflect conditions in the industry, because the straight line method is not used by the industry and does not actually revested but is held without earning anything from the time of accumulation to the time of actual use in replacing the property.

The difference between the engineers therefore does not result from the method by which the actual deteriorated condition of the property is determined, but rather from a difference as to what should be done with the fund that is to be used to replace the property. For this reason the criticisms and authorities referred to by counsel are not in point.

C. The Commission under the decisions of the state and federal courts was required to give consideration to and have its valuation reflect such consideration of the increased cost of reproducing the property at present day prices.

The rule of the courts however is that in view of the "great advance in prices during and after the war" a valuation of public utilities property must "reflect actual value of the property as of the time the valuation is made." "A valuation which does not as to tangible property substantially reflect the then cost of reproduction less depreciation does not meet the requirements."

Waukesha Gas & Electric Co. vs. Railroad Commission, 191 Wis. 565 at 569.

Ashland Water Company vs. Railroad Commission, 7 Fed. (2nd) 924 at 929 and 930.

State ex rel. Southern Bell Telephone Co. vs. Public Service Comm., 262 U. S. 276.

Georgia Railway & Power Co. vs. Railroad Commission, 262 U. S. 625.

Bluefields Waterworks & Improvement Co. vs. Public Service Comm., 262 U. S. 679.

Ohio Utilities Co. vs. Public Utilities Comm. of Ohio, 267 U. S. 359.

Standard Oil Co. vs. Southern Pacific Co., 268 U. S. 146.

Brush Electric Co. vs. Galveston, 262 U. S. 443.

Monroe Gas Light Co. vs. Michigan Public Utilities Comm., 292 Fed. 139 at 143.

McCardle vs. Indianapolis Water Co., 272 U. S. 400.

Van Wert Gas Light Co. vs. Michigan Public Utilities Comm., 299 Fed. 670 at 673.

New York Telephone Co. vs. Prendergast, 300 Fed. 822.

Consolidated Gas Co. vs. Prendergast, 6 Fed. (2nd) 243 at 280.

Minneapolis vs. Rand, 285 Fed. 818 at 826 and 827.

Mobile Gas Co. vs. Patterson, 293 Fed. 208 at 211 and 218.

Joplin Gas Co. vs. Public Service Comm., 296 Fed. 271 and 277.

Consolidated Gas Co. vs. Newton, 267 Fed. 231 at 236-238.

In the Waukesha case, supra, it was said:

"Hence where there has been a period of rising prices for many years, original cost plus cost of additions do not correctly measure the present value. Such a method may form the main basis of a valuation during the period of fairly

stable prices, but it does not as applied to prices from 1912 and earlier down to 1922. Since the basic result to be reached is the present and near future fair value of the property, any method that will accomplish that result is a proper method. It is doubtful if any method will accomplish such result unless it *substantially* reflects or agrees with present or recent reproduction cost less depreciation. The method employed by the *Commission* in the instant case does not do so, and under the federal rule referred to must be set aside as confiscatory and unreasonable."

The method applied in the Waukesha case, supra, by the Commission was the so-called split inventory method of valuation using the average prices prior to 1916 for property installed prior to that date, and adding thereto the cost of the property after 1916 as to any such additions. In this case the commission in form considered present day prices, then rejected them, and accepted less than the depreciated split inventory valuation with materials and supplies, and working capital, but without going value.

St. Louis & O'Fallon R. Co. vs. U. S., 279 U. S. 461, 486.

The decision here as in the case above

"carefully refrains from stating that any consideration whatever was given to present or reproduction costs in estimating the value of the carriers' (plaintiffs') property."

The Commission here resorted to a method of cutting down value identical to that condemned in

Ohio Utilities Co. vs. Comm., 267 U. S. 359, 362, 363,

in that it had before it undisputed evidence of value but arbitrarily ignored that value and substituted its own guess.

In the McCardle case, supra, the United States Supreme Court said:

> "In fact, prices and values have so changed that the amount paid for land in the early years of the enterprise and the cost of plant elements constructed prior to the great rise of prices due to the war do not constitute any real indication of their value at the present time."

In the *Ashland* case, supra, decided by a three judge court in the Western District of Wisconsin, and referring to property directly across the bay from the Washburn property, now in suit, said:

> "That dominant or controlling—or, in any event, due, or substantial, reasonable, or fair—consideration *must* be given to the evidence of reproduction costs at the time of hearing. Whatever debate may be indulged in respecting the adjective to be imported into the rule deducible from the decisions, it seems difficult to escape the conclusion reached in the *Monroe Gas* case (D.C.) 292 F. 139, that *dominant* consideration must be given; that such is the 'necessary implication' found in the *results* in those cases."

In this case the Commission employed the same method condemned by our own Supreme Court in the *Waukesha Gas* case, supra.

In this connection we submit that it conclusively appears on the record that while the Commission stated that it was giving consideration to the present cost of reproducing the property, it later used and applied the split inventory method condemned in the *Ashland* case, supra. This for the reason that the valuation ultimately allowed for rate making purposes exceeded by less than Thirty Five Hundred ($3500.00) Dollars, the split inventory valuation of this property, as determined by the Commission (Exhibit C, R. 39), and if to the split inventory valuation we add allowance for working capi-

tal, materials and supplies and subsequent additions, the value arrived at is less than the depreciated split inventory value.

That being true this case was clearly decided in deliberate disregard of the Court's decision in the *Ashland* case, supra.

D. By not allowing going value and failing to fix that element of value in this case the Commission deprives the plaintiffs of an element of value and therefore of a property right.

All of the estimates of value prepared by the engineering staff of the Railroad Commission specifically stated that they did not include any allowance for going value, materials and supplies on hand or working capital. This was an important element in the decision in this case, and under the decisions the plaintiff was entitled to a determination of the going value, material and supplies on hand and working capital, and to the inclusion of these elements of value in the order made by the Railroad Commission.

Southwestern Bell Telephone Co. vs. City of Ft. Smith, 294 Fed. 102, at 103 and 106. (Affirmed by the United States Supreme Court on the authority of previous cases. See 70 L. Ed. 236, memorandum decision).

Mobile Gas Co. vs. Patterson, 293 Fed. 208 at 216.

Minneapolis vs. Rand, 285 Fed. 818, 830.

Public Service Railway Co. vs. Board of Public Utility Commissioners, 276 Fed. 979 at 987.

Ohio Utilities Co. vs. Comm., 267 U. S. 359, 362, 363.

E. The plaintiffs are entitled to the "independent judgment of the court as to both the law and the fact" especially where it is apparent from the proceedings that a deliberate attempt on the part of the Commission is being made to circumvent the decisions of this court guaranteeing due process.

As shown in the statement of facts the Commission's engineers have depreciated the property of this company way below their previous conclusions. The Commission after waiting nearly a year before rendering its decision accepted without readjustment the cost of reproducing the property at a figure over $7,000.00 less than actual cost. This, as indicated above was due to the fact that at the time the Commission's engineers made their valuation there was a temporary slump in prices which recovered during 1928. This fact the Commission, however, wholly ignored, though it was evident by December 4, 1928, the date of its decision (Hartt Aff. R. 85).

It absolutely ignored items for going value, materials and supplies and working capital unless it can be said that it accepted the split inventory valuation and added these items, except going value, to that valuation to arrive at the $75,000 decision.

The admitted action of the Commission in proceeding to cut actual operating expenses over $5,000 annually, without evidence in the record to support such action, should cast suspicion upon the whole result of the Commission's action. (R. 10-11, 14, 57, 60, 61).

The determination of the Commission as late as 1925 that the revenues were inadequate to earn a fair return on even $53,000 of value (R. 7, 12, 13) should require careful scrutiny of its later determination especially since operating expenses and revenues remained stationary.

The change in the method of determining depreciation of the property, resulting in the great disparity in comparison

of condition of the property between 1924 and 1928 is also evidenced by arbitrariness challenging attention. (R. 86, 87). (See infra, analysis statement of facts.)

Under these circumstances this court should judge for itself what the facts are.

Ohio Valley Water Co. vs. Ben Avon, 253 U. S. 287, 289.
Bluefield Co. vs. Public Service Comm., 262 U. S. 679.

In the latter case the court said:

"Plaintiff in error is entitled under the due process clause of the Fourteenth Amendment to the independent judgment of the court as to both law and facts. *Ohio Valley Water Co. vs. Ben Avon Borough,* 253 U. S. 287, 289, and cases cited." (262 U. S. 689).

F. The Commission's only justification for ignoring the decisions of the courts are the conditions referred to above but the record fails to disclose any justification for such action and nowhere in the evidence is it shown that the conditions relied upon by the Commission had any effect upon the value of the property of the plaintiffs.

Notwithstanding the fact that its decision of 1924, fixing a value of Fifty Thousand ($50,000.00) Dollars for this property (Exhibit A) had been set aside by the Circuit Court of Dane County, as being inadequate and purely arbitrary and in violation of the decisions of the Federal Court as well as the Supreme Court of the State of Wisconsin, the Commission in its decision and order (Exhibit C, R. 39) reiterated part of its language condemned by the court in the previous decision.

The conditions referred to by the Commission in the 1924 order, which has been set aside as illegal, and from which

decision the Commission has not seen fit to appeal, recited the fact that the abnormal growth of Washburn during the war was checked and reaction set in after the war, resulting in the removal from Washburn of a considerable number of people. Using this testimony as a basis and without determining the value of the property in Washburn during the war, the Commission proceeds to reduce the value of the Washburn Water Works property below cost and at the arbitrary figure of Seventy Five Thousand ($75,000.00) Dollars. In other words it took one type of Washburn property and increased its value during the war several fold then it took the Washburn Water Works property, never increased its value correspondingly, but assumed that it decreased in value, not from the high level of war time but from the lower level of actual cost. This method the Circuit Court of Dane County declared to be arbitrary, but notwithstanding such declaration, the Commission readopted it in the present case. In so doing the Commission was arbitrary and unfair to the plaintiffs.

Ashland Water Co. vs. Railroad Commission, 7 Fed. (2nd) 924 at 935 and 936.

Wisconsin-Minnesota Light & Power Co. vs. Railroad Comm., 183 Wis. 96 at 103 and 104.

In the Ashland Water Company case, supra, page 935 the court said:

"But the suggestion that apprehension growing out of a decrease of population is sufficient to justify a court in utterly ignoring a rule requiring *due* or *reasonable* consideration to be given to evidence of reproduction cost challenges attention, when once we consider its effect upon judicial duty. Plainly, it suggests that commissions and courts may broadly divide communities having utilities into at least three classes: Those which are 'live' and 'pro-

gressive'; those which are 'stable' or 'standard'; those which are 'stagnant' or 'retrogressive' in respect of population. And if this phase is of the importance sought to be given it in this case, of course it must lead to a discharge of duty both with respect to values, and to utility rates which afford return upon 'fair' values (in a constitutional sense), which will square with that fundamental idea. The circumstance of progressive increase of population of *itself* must entitle a utility in a rich and progressive community to relatively higher rates, the second class will be entitled to receive only a sort of 'standard' rate or consideration, while the utility in a stagnant community, no matter what the cost of its property, must bow to a retrogressive rate—that is, 'relatively' retrogressive.

It would seem to approach the ludicrous to put these considerations forward as a basis for ignoring wholly reproduction cost evidence, and yet, at the same time, allow a commission or a court to consider seriously property in a stagnant community on the basis of *reasonably prudent investment value*. It amounts in substance to this: That not only with respect to reproduction cost evidence, but with respect to evidence bearing pertinently upon any other rule or theory of value, commissions and courts are always endowed with a power, if the community may be characterized loosely as stagnant or retrogressive, to decree that the utility entitled to have its property valued shall have *dying* values and *dying* rates. It suffices to note that the commission never saw fit to develop the case along this line, and, if it had, the views above sought to be elaborated are equally tenable against any possible plan or scheme of valuation, and, of course, destroy the rule which the plaintiff here can invoke, namely, that *reasonable consideration* must be given to reproduction cost evidence."

Bearing in mind that the observations of the court in the latter case apply to a situation immediately across the bay from Washburn, it is of course to be observed that such a method cannot be right in one place and wrong in the other,

and that this procedure must condemn the proceedings of the Railroad Commission.

It may not be amiss to say that following the decision of this court in the Ashland water case, a new application was made to the Railroad Commission for an increase in rates in that city, and after the testimony was closed the Commission could find no escape from increasing the rates above those fixed by the order of this court unless the city would agree to waive the increase in taxes because of the higher valuation fixed by this court. As a result of this recommendation the city did waive the increased taxes and the case was settled on that basis. All of this appears from the records of the Railroad Commission, of which this court will take judicial notice.

G. The efforts on the part of the Commission to find a value by comparing rates in Washburn with rates in other communities and the claim that the rates in Washburn were unusually high and that this fact affected the value of the property were clearly erroneous.

As one of its reasons for allowing a low valuation for the property of this company, the Commission in its order of 1924 (R. 30) discussed the question of rates in Washburn and attempted to compare these rates with rates in other communities. The only evidence in the record as to comparative rates related to other cities of the state wherein the waterworks properties were owned by the municipalities, and where by reason of not taxing such utilities, and by reason of managing the properties through salaried officials of the city whose salaries are not allocated or apportioned to the utilities, these municipalities are able to operate their plants with less expense actually charged against them than could pri-

vate concerns. That fact of itself discredits the effort of the Commission in this regard.

Ashland Water Company vs. Railroad Comm., 7 Fed. (2nd) 924 at 937.

"Each utility in each community is entitled to a valuation upon evidence legally pertinent to its property; not merely, in difficult cases, to a referendum to other cities. There can be no need of rules or principles guiding commissions in valuations of property, if such considerations may dominate *evidence* of value in the particular case."

THE COMMISSION HAS IGNORED ACTUAL OPERATING EXPENSES AND SUBSTITUTED ITS OWN ESTIMATE OF WHAT SHOULD BE PROPER OPERATING EXPENSES, THEREBY DECREASING THE ALLOWANCE FOR EXPENSES OF THE COMPANY BY OVER $5,000 WITHOUT ANY EVIDENCE TO SUPPORT SUCH ACTION.

A. The reduction of actual pumping costs by $1,650 annually was arbitrary.

The complaint alleges that

"In order to arrive at the arbitrary and unreasonable estimate of operating expenses used by the Commission in arriving at its decision of December 4, 1928, the Commission stated as reason for not accepting the actual expenses as above set forth, was, that in their judgment pumping expenses were too high.

"To reduce this item they recommended the installation of an additional smaller electric pump, which would necessarily be required to operate longer hours, would improve the electric load factor and thereby reduce the rates that would be charged for the electric energy consumed. At the

time of the hearing, however, the experts, representing the Commission, stated that they had insufficient proof to warrant such a conclusion, and nowhere in the records is [fol. 20] there any proof supporting the ultimate conclusions of the Commission and the recommendations of the Commission are absolutely refuted by the undisputed testimony in the record." (R. 14).

This charge in the complaint is admitted in the following language of the answer:

"Defendants admit that the railroad commission discounted and reduced the actual operating expenses of the company by determining that it should install an additional electric pump. * * Defendants admit that the Commission arrived at an estimated net saving in pumping costs of $1,650.83, thus reducing pumping costs from $6,558.83, as shown by the annual report of 1927, to an estimated figure of $4,908.00." (R. 57).

And also stated

"Defendants admit that the commission recommended the installation of a smaller electric pump, which would be required to operate longer hours, which would improve the electric load factor and thereby reduce the rates charged for electric energy consumed. *Defendants admit that at the time of the hearing the experts representing the commission stated that they had insufficient proof to warrant such conclusion.* Defendants allege that subsequent to said hearing, evidence was secured to show that the pumping cost could be reduced in accordance with the estimate of the commission." (R. 60-61).

So that at some time after the hearing before the Commission, without notice to the plaintiffs, the engineers of the Commission came to a conclusion which they could not justify under oath at the hearing before the Commission.

In this connection, however, it is interesting to note what these conclusions of the engineers representing the Commission actually were, as reflected by the same conclusions submitted in this case. It is said:

"It is not proposed to dispense with the large centrifugal pump for it is needed at times when the reservoir has an insufficient supply of water for fires. In order to secure the lower rate for power the large motor and pump must be idle and with *intelligent operation* and *fortunate distribution of large fires or other necessity* of operating the large pump a substantial saving may be made. The margin appears to be sufficient to write off the fixed charges and the cost of additional equipment and labor of installation within a few years assuming occasional use of the large pump and motor now installed with *wise handling, proper installation* and *cooperation*, and *favorable circumstances*, the saving *may* amount to two thousand dollars a year." (R. 105-106).

The Commission apparently adopted the qualified conclusions of its engineering staff as is evidenced by the following statement in its order of December 4, 1928:

"It is not proposed to dispense with the large centrifugal pump for it is needed at times when the reservoir has an insufficient supply of water for fires. In order to secure the lower rate for power the large motor and pump must be idle and with *intelligent operation* and *fortunate distribution of large fires or other necessity of operating the large pump* a substantial saving may be made. The margin appears to be sufficient to write off the fixed charges and the cost of additional equipment and labor of installation within a few years assuming occasional use of the large pump and motor now installed. With *wise handling, proper installation* and *cooperation*, and *favorable circumstances*, the saving *may* amount to two thousand dollars a year. * * (R. 39, 40).

That then constitutes the basis for ignoring actual operating conditions and actual operating expenses, and, is advanced as the justification for submitting the Commission's estimate of pumping expenses for the company's actual history showing operating expenses. By this means the Commission cut the actual pumping expenses from $6,558.83 for 1927 to $4,908.00. (R. 10, 57).

The plaintiffs on the other hand show that in complying with the Commission's suggestion in its order of 1925, wherein the Commission estimated the annual saving of $3,000 in pumping costs if an electric pump were installed, as against the steam pump operation (R. 15, 61) installed an electric pump with the result that pumping costs in 1925, the last full year of steam operation, were $7,923.06 (R. 33) against $6,558.83 in 1927, the first full year of electrical operation (R. 10, 57) or a reduction of less than $1400. This reduction was actually less than the difference between the cost of steam plant operation in 1925 over 1924 (R. 33).

The care with which the present installation of the electric pump was made is evidenced by the affidavit of Mr. Maxcy, the manager and receiver of the water works company when he says

"Affiant further says that with respect to the pumping costs criticized by said Railroad Commission that prior to the installation of the present pump, affiant made a careful investigation to determine the proper size of such installation and consulted with T. W. Gray, an experienced water works builder and operator with over thirty years experience, and also had information from the engineers of Allis-Chalmers Company, and as a result of such investigation and the advice received from such sources, this affiant made the installation of the type and size of pump now criticized by the Railroad Commission; that considering all of the demands of the City of Washburn, it is the opinion of this affiant and was the opinion of such experts

that a pump of the size now installed was necessary; moreover in making such installation, consideration was also given to the fact that in the event of a failure of the reservoir at any time, resort must be had to the pump for direct pressure in the event of an emergency such as a fire, and to meet such an emergency a pump of the size installed was and is absolutely necessary.

Said pump having been installed in reliance upon the opinion of such experts, affiant thereupon proceeded to enter into a contract with the Lake Superior District Power Company, which commits him to a minimum annual bill in excess of the estimate for electric energy referred to in the Commission's order of December 4, 1928; and said contract will not expire until May 1, 1931; said contract being made in the light of the particular installation of the particular pump criticized by the Railroad Commission." (R. 79).

Moreover, as appears from the affidavit above, the plaintiffs are now bound by contract until May, 1931, to buy on the basis of the present rates and could not obtain the reduction hoped for by the Commission, if they tried. Here again the action of the Commission is purely arbitrary and unjustified.

The decrease in the recorded pumpage is not due to the increase in metered customers and therefore does not sustain the Commission's attempt to criticize operating expenses on the account of refusal to install more meters.

A marked variation is shown in the pumpage of this plant:

"Year	Pumpage during the year, gallons
1928	59,340,000
1927	68,550.000
1926	97,311,264
1925	135,961,411
1924	146,051,576
1923	155,815,111
1922	169,264,142
1921	171,682,162
1920	164,282,880"

(R. 103).

Following the tabulation of this result in its order of December 4, 1928 (R. 40) the Commission says:

"A considerable part of the excessive pumpage year after year can be attributed to no other cause than the lack of restraint on customers as regards the waste of water. By January 1, 1923, only 51 meters were in use. During 1925 21 additional were installed, while in 1926 40 more were placed. During 1927, 44 meters were set, making a total of 156 metered and 369 unmetered customers on December 31, 1927. We believe the decrease in pumpage noted above is due largely to the installation of meters." (R. 40, 41).

The plaintiffs deny this and explain the decrease in pumpage as follows:

"The steam pumps, referred to above, were depreciated 75 per cent by this affiant in making his valuation (see valuation detail, page 13) largely because of evidence of excessive slippage developed by such pumps. The pumpage computed by the company is not measured by accurate meters, but is measured by counting the strokes of the steam pump and by determining the length of time the electric pump operates. The pumpage computed during the time

the steam pump was in operation was considerably in error, due to the excessive slippage, while the electric pump is new and computing pumpage from hours and minutes of operation gives a more accurate estimate of the amount of water pumped. This, in my judgment, accounts for the greater part of the difference in the pumpage in 1926 and 1927. The fact that 1926 had seven months of steam pumpage and five months of electric pumpage emphasizes this conclusion when compared with the figures of 1927." (R. 87).

W. G. Maxcy, with thirty years of experience as an owner and operator of twelve or more utilities (R. 45) stated that as manager of the property of the plaintiffs he has studied the meter situation and in his judgment the additional cost incident to the installation of meters, maintenance thereof, reading and billing would more than offset operating expenses resulting from greater pumpage, due to waste of water by unmetered customers. (R. 77).

Defendants plead

"—that they have no information sufficient to form a belief as to the truth of the allegations contained in paragraph XVII of said bill of complaint to the effect that by reason of the nature of the business and the additional operating expenses incident to the reading of meters, repairing of meters, change or installation of meters, as well as other similar expense and the carrying cost of such property, it is not economical to install more meters, and that the saving incident to the use of meters is less than the sum of such items of expense." (R. 62).

Nowhere in the record are the claims of the plaintiffs contradicted. All that the Commission's engineers say is that meters reduce water consumption (R. 104). This is all therefore that persuaded the Commission to set its judgment against that of the management of this company.

B. The reduction of distribution, commercial and general expenses below the actual previous amounts for such items was purely arbitrary.

The complaint alleges that these items were reduced without any evidence in the record justifying such action. (R. 10, 11).

The answer admits this charge by saying "Defendants admit that the distribution, commercial and general expense was cut by the order of the Commission in the amount of $2,718.45," but it denies that such conclusion was not supported by the record before the Commission.

At the hearing in the lower court no evidence was offered to sustain or justify any of these reductions nor was there any evidence offered showing why the Commission made these reductions. All of the evidence offered by the defendants was directed to the proposition that the pumping costs could be reduced by the installation of a smaller pump. For this reason the action of the Commission must be supported, if at all, upon the proposition advanced by the Commission in its decision that "from our knowledge of prevailing financial conditions of business enterprises in Washburn, it is apparent that the water utility is in a much better financial condition than other classes of business" and undoubtedly the Commission concluded that under those circumstances the water utility would simply be denied part of the necessary operating expenses for the items referred to. This action of course again was purely arbitrary.

C. The failure to allow amortization of accumulated legal expense and receiver's fees was wholly arbitrary.

This, then, is the basis upon which the Commission cut the pumping expenses by $1650.00 and the distribution, commer-

cial and general expenses by $2718.45 (R. 57). Moreover it refused to consider management and legal expenses accrued in "fighting this Commission's orders," although the answer admits this "fighting" was always successful and also that not all of the expenses included were for this purpose (R. 58), the expenses representing an effort to obtain adequate rates as well as to prevent confiscation of the plaintiffs' property under the purchase proceeding set out in the record (R. 21-31). The accrued expenses amount to $5,000 and should be amortized over a five year period.

D. By thus substituting a theory of operating expenses over $5,000 less than the actual operating expenses the Commission improperly and illegally interfered with the management of the company and the result thus obtained can therefore not be sustained.

In thus disregarding actual experience of the plaintiffs the Commission had no evidence to support this practice and further it set its judgment of what were proper operating expenses against the actual history and the judgment of those in charge of the property, and in these respects the Commission violated the rules laid down by the Federal and Wisconsin courts.

Without any foundation in the record and contrary to the experience and judgment of the plaintiffs, the Commission thereafter set its judgment against the experience and judgment of the plaintiffs. The arbitrariness of this action is further evidenced by the fact that in two previous decisions, the Commission had found that the plaintiffs' rates were inadequate and did not provide an adequate return on a valuation of about $53,000 (R. 12, 13, 59).

State ex rel. S. W. Bell Telephone Company vs. Public Service Commission, 262 U. S. 276, 288, 289 (1923).

S. W. Bell Telephone Company vs. Fort Smith, 294 Fed. 102, 198 (W. D. Ark. 1923). Affirmed 70 L. Ed. 236.

St. Joseph R. L. H. & P. vs. Public Service Commission, 268 Fed. 267, 268 (W. D. Mo. 1920).

Minneapolis, St. P. & Ste. M. R. R. vs. Railroad Commission, 136 Wis. 146, 164.

Wisconsin-Minnesota Light & Power Co. vs. Railroad Commission, 183 Wis. 96.

Wisconsin-Minnesota Light & Power Co. vs. Railroad Commission, 183 Wis. 104, 105.

Ohio Utilities Co. vs. Comm., 267 U. S. 359, 362, 363.

"The Commission arrived at its conclusion by substituting for the experience of the company estimates as to future revenues and future operating costs. In setting aside the existing rate the Commission cannot substitute for the experience of the company its estimates as to the future revenues and operating costs. * * Estimates as to revenues could not change the fact as it existed." (*Wisconsin-Minnesota Light & Power Co. vs. Railroad Commission,* 183 Wis. 105, 106.)

The exclusion of the legal expenses of the company was improper because this was an element of expense incident to the operation of this company which the public is required to bear.

Monroe Gas Light & Fuel Co. vs. Michigan Public Utilities Commission, 11 Fed. (2nd) 319-325.

Winona W. M. L. & P. Co., 276 Fed. 996.

Patterson vs. Mobile Gas Company, 293 Fed. 208.

Columbus Gas & Fuel Company vs. Columbus, 17 Fed. (2nd) 630 at 640.

Spring Valley Water Works vs. San Francisco, 192 Fed. 137, 190.

San Diego Water Works Co. vs. San Diego, 50 Pac. 633; 118 Cal. 556, 574.

UPON EITHER OBJECTION RAISED BY THE RECORD THE ORDER OF THE COMMISSION MUST FALL.

From what appears by the admissions of the defendants in this case the order of the Commission cannot stand. If the court were to disregard the arbitrariness of the finding of value entirely it is clear that even on the value found and with the past experience of the plaintiffs, the revenue provided by the Commission was less than the actual operating expenses, taxes and depreciation, and that nothing has been provided for return. On that basis, on the Commission's own valuation and its finding of seven per cent return as being reasonable, a proposition which we are not ready to concede, additional revenue of $5,250 is required to avoid confiscation.

The decree in this case does not fix a rate base, it finds no value, it merely sets aside the order of the Commission and enjoins any steps to enforce the order of the Commission dated December 4, 1928, and further enjoins interference with rates providing adequate returns, and from intrefering with the plaintiffs in charging adequate and reasonable rates, rendering a fair and adequate return on the value of the property of the plaintiffs used and useful in its business.

It leaves the Commission free to reconsider the rates of the plaintiffs and admonishes it only to respect the laws of the land.

For these reasons the decree should be affirmed.

Respectfully submitted,

H. L. BUTLER,
H. H. THOMAS,
B. H. STEBBINS,
R. M. STROUD,
R. M. RIESER,

Attorneys for Plaintiffs and Respondents.

OLIN AND BUTLER,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

No. 301.—October Term, 1929.

Railroad Commission of Wisconsin, Lewis E. Gettle, Adolph Kanneberg, et al., etc., Appellants,
vs.
W. G. Maxcy, as Receiver of the Washburn Water Works and Washburn Water Works Company.

Appeal from the District Court of the United States for the Western District of Wisconsin.

[March 12, 1930.]

Per Curiam.

This is an appeal from the decree of the District Court, composed of three judges as required by the statute, enjoining the appellants from enforcing an order of the Railroad Commission of Wisconsin fixing rates to be charged by the receiver of the Washburn Water Works Company for supplying water. The District Court gave no opinion and, aside from the general recital in the decree that the court had considered the evidence submitted by the parties and that it appeared therefrom that the valuation fixed by the Railroad Commission of the property of the Company for rate making purposes was not supported, the record contains no finding whatever by the District Court.

This Court has repeatedly adverted to the importance in a suit of this character of a statement by the District Court of the grounds of its decision. *Virginian Railway Company* v. *United States*, 272 U. S. 658, 674, 675; *Lawrence, et al.* v. *St. Louis-San Francisco Railway Company*, 274 U. S. 588, 596; *Cleveland, etc. Ry. Co.* v. *United States*, 275 U. S. 404, 414; *Baltimore & Ohio Railroad Company* v. *United States*, 279 U. S. 781, 787.

In *Lawrence, et al.* v. *St. Louis-San Francisco Railway Company, supra*, the court said: "The importance of an opinion to litigants and to this Court in cases of this character was pointed out in *Virginian Ry. Co.* v. *United States*, 272 U. S. 658, 675. The im-

portance is even greater where the decree enjoins the enforcement of a state law or the action of state officials thereunder. For then, the respect due to the State demands that the need for nullifying the action of its legislature or of its executive officials be persuasively shown."

In the present instance this Court should have the aid of appropriate findings by the District Court of the facts which underlie its conclusions.

The decree is set aside, and the cause is remanded to the District Court, specially constituted as provided by the statute, to state its findings of fact and conclusions of law and enter a decree therein, the restraining order entered in this suit to be continued pending further action by the District Court.

A true copy.

Test:

Clerk, Supreme Court, U. S.